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132-295

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~261~~. 89

THE CITY OF CLEVELAND, PLAINTIFF IN ERROR,

vs.

HENRY KING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 23, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 361.

THE CITY OF CLEVELAND, PLAINTIFF IN ERROR,

vs.

HENRY KING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 2, 1889.

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1 The United States of America to Henry King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, eastern division, wherein The City of Cleveland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, district judge U. S. & one of the judges of said circuit court, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

M. WELKER,
Dist. Judge U. S., N. D. O.

1*a* On this 12th day of June, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared John Odell, deputy marshal of the United States for the northern district of Ohio, before me, the subscriber, Geo. Wyman, a notary public in and for the county of Cuyahoga and State of Ohio, and makes oath that he delivered a true copy of the within citation to Henry King at Brimfield township, Portage county, Ohio, on the 10th day of June, A. D. 1886.

JOHN ODELL.

Sworn to and subscribed the twelfth day of June, A. D. 1886.
[Notarial Seal, Cuyahoga Co., O.]

GEO. WYMAN,
Notary Public.

Service	2 00
Copy	50
Travel, 36 miles	2 16
	$4 66
Affidavit	25
	$4 91

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you as judges, between Henry King, as plaintiff, and The City of Cleveland, a manifest error hath happened, to the great damage of the said The City of Cleveland, as by its complaint appears, we, being

willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 28th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Seal of the Circuit Court, North'n Dist. of Ohio.

AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States,
Northern District of Ohio, E. D.

Allowed by—
——— ———.

[Endorsed:] 4003. Henry King *vs.* The City of Cleveland. Writ of error.

3 UNITED STATES OF AMERICA,
Eastern Division, Northern District of Ohio:

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that, in obedience to the command of the within writ of error, the court has duly searched the record and proceedings of the said court in the cause aforesaid and now herewith transmit- to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at office, in the city of Cleveland, this 22d day of June, A. D. 1886.

AUGUSTUS J. RICKS, *Clerk.*

4 Be it remembered that heretofore, to wit, on the 17th day of July, A. D. 1880, the following petition was filed in this cause in said court, viz:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Def't. } Petition.

The said Henry King, plaintiff, a citizen of the State of Pennsylvania, complains of the said City of Cleveland, defendant, a mu-

nicipal corporation duly created, organized, and existing under the laws of the State of Ohio, a citizen of said State of Ohio, and located in the county of Cuyahoga, in said northern district of Ohio, in the eastern division thereof, for that before and at the time of the committing of the injury hereinafter mentioned there was, and from -hence hitherto has been, a certain common, public street and highway in said city of Cleveland, called Bank street, for the free passage of all persons on foot and with their teams, horses, wagons, and carriages at all times; and thereupon it became and was the duty of the said defendant, as required by the statute of the State of Ohio in such case made and provided, to cause said street to be kept open and in repair and free from nuisance; and yet the said defendant, well knowing the premises, heretofore, on the 12th day of November, A. D. 1879, wrongfully licensed and gave permission to one E. Rosenfeld, his servants, agents, and employees, to place and cause to be placed divers large quantities of dirt, sand, rubbish, stones, and other materials for building purposes in and across said street, and negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stones, and other materials to occupy and obstruct more than one-half of the width of said street, and to continue therein, and during the night time of that day, without placing or causing to be placed any light or signal near such dirt, sand, rubbish, stones, and other materials to denote that the same were there, whereby the plaintiff, lawfully passing in and along said street, in the night time of the said day, in a certain carriage drawn by horses, was then and there, by reason of said dirt, sand, rubbish, stones, and other materials so wrongfully placed in said street and in consequence of said negligence and improper conduct of the defendant, with great force and violence, overturned, without the fault or negligence of the plaintiff, and one of the legs of the plaintiff was thereby fractured and broken and the plaintiff otherwise bruised and injured. By reason thereof the plaintiff became and was for a long time sick, lame, and diseased, and was obliged to and actually expended about the sum of two thousand dollars for surgical and other treatment and attendance in attempting to get healed and cured of his said injury; has already been unable to attend to his usual business, of a manufacturer of iron, for more than seven months, and it is now uncertain when, if ever, he will be able to fully attend to his usual business; the use of his said leg has been permanently impaired, and the plaintiff has been otherwise greatly injured. The plaintiff, by reason of the premises, has sustained damages to the amount of twenty thousand dollars, for which he asks judgment.

RICHARD BACON AND F. J. DICKMAN,
Pl'ff's Att'ys.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Richard Bacon, being first duly sworn, says that he is one of the attorneys of the above-named Henry King, duly authorized in the premises; that the said Henry King is a non-resident of said State

of Ohio and is now absent therefrom, and that the facts stated and allegations contained in the foregoing petition are true as affiant verily believes.

RICHARD BACON.

Sworn to before me by the said Richard Bacon and by him subscribed in my presence this 17th day of July, A. D. 1880.

A. H. WEED, [SEAL.]
Notary Public.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Precipe.

To clerk:

Issue summons upon the petition in the above case, returnable according to law. Amount of damages claimed, $20,000.

RICHARD BACON AND
F. J. DICKMAN,
Pl'ff's Att'ys.

And afterwards, to wit, on the 19th day of July, A. D. 1880, the following summons was filed in this cause in said court, viz:

7 *Summons.*

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio,

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to notify the City of Cleveland that it has been sued by Henry King in the circuit court of the United States within and for the said district, and that unless it answer by the 14th day of August, A. D. 1880, the petition of the said plaintiff against it, filed in the clerk's office of said court at Cleveland, in said district, such petition will be taken as true and judgment will be rendered accordingly.

You will make due return of this summons on the 26th day of July, A. D. 1880.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 17th day of July, A. D. 1880, and in the 105th year of the Independence of the United States of America.

[SEAL.]

A. J. RICKS, *Clerk,*
By E. W. PAGE,
Deputy Clerk.

Returnable 2nd Monday after issued. Ans. by 3rd Saturday after return day. Charles A. Otis has acknowledged himself security for all costs for which the plaintiff may be liable in this suit.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 17th day of July, A. D. 1880, I made due service of this writ on the within-named City of Cleveland by delivering to R. R. Herrick, mayor thereof, a true and duly certified copy of this writ at Cleveland, Ohio.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

8 (Endorsed:) Summons. Amount of damages claimed, $20,000.00. Returnable July 26th, 1880. Rule for answer August 14th, 1880. Returned and filed July 19th, 1880. A. J. Ricks, clerk.

And afterwards, to wit, on the 13th day of Aug., A. D. 1880, the following motion was filed in this cause in said court, viz:

Motion to Make Petition More Definite.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Motion to Make Petition More Definite and Certain.

Now comes the said defendant and moves the court here to require said plaintiff to make his petition more definite and certain in this particular, to wit, that he be required to state definitely and particularly where on Bank street or before what premises on Bank street the injury alleged in said petition was received, in order that said defendant may be able to locate the place where the alleged injury was committed.

By HEISLEY, WEH AND WALLACE,
Att'ys for Def't.

And afterwards, to wit, on Saturday, October 16th, A. D. 1880—present, the Honorable Martin Welker, district judge—the following order was entered in this cause in said court, viz:

Order of Leave to Amend Petition.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant.

9 In this cause the defendant's motion to require the plaintiff to make his petition more definite and certain is, by leave of the court, withdrawn. Leave is given the plaintiff to amend his petition by interlineation as follows, to wit: After the word "street,"

in the second line from bottom of the first page, the following: "At, near, or before a certain building or tenement abutting on the east side of said street, and being number 56 thereon, and now occupied by said E. Rosenfeld." After the word street, in second line of second page, "at the place aforesaid;" after the word "business," in the twenty-third line of same page, "and by reason of such inability to attend to his said business has lost and been deprived of great gains, &c.;" and leave is also given the defendant to file its answer by December 1st, A. D. 1880.

And afterwards, to wit, on the 16th day of Oct., A. D. 1880, the following amended petition was filed in this cause in said court, viz:

Amended Petition.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant.

The said Henry King, plaintiff, a citizen of the State of Pennsylvania, complains of the said City of Cleveland, defendant, a municipal corporation duly created, organized, and existing under the laws of the State of Ohio, a citizen of said State of Ohio, and located in the county of Cuyahoga, in said northern district of Ohio, in the eastern division thereof, for that before and at the time of the committing of the injury hereafter mentioned there was, and from
10 -hence hitherto has been, a certain common, public street and highway in said city of Cleveland, called Bank street, for the free passage of all persons on foot and with their teams, horses, wagons, and carriages at all times; and thereupon it became and was the duty of the said defendant, as required by the statute of the State of Ohio in such case made and provided, to cause said street to be kept open and in repair and free from nuisance; and yet the said defendant, well knowing the premises, heretofore, on the 12th day of November, A. D. 1879, wrongfully licensed and gave permission to one E. Rosenfeld, his servants, agents, and employees, to place and cause to be placed divers large quantities of dirt, sand, rubbish, stones, and other materials for building purposes in and across said street at, near, or before a certain building or tenement abutting on the east side of said street, and being number 56 thereon, and now occupied by E. Rosenfeld, and negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stones, and other materials to occupy and obstruct more than one-half of the width of said street at the place aforesaid and to continue therein, and during the night time of that day, without placing or causing to be placed any light or signal near such dirt, sand, rubbish, stones, and other materials to denote that the same were there, whereby the plaintiff, lawfully passing in and along said street, in the night time of the said day,

in a certain carriage drawn by horses, was then and there, by reason of said dirt, sand, rubbish, stones, and other materials so wrongfully placed in said street and in consequence of said negligence and improper conduct of the defendant, with great force and violence, overturned, without the fault or negligence of the plaintiff, and one of the legs of the plaintiff was thereby fractured and broken and
11 the plaintiff otherwise bruised and injured. By reason thereof the plaintiff became and was for a long time sick, lame, and diseased, and was obliged to and actually expended about the sum of two thousand dollars for surgical and other treatment and attendance in attempting to get healed and cured of his said injury; has already been unable to attend to his usual business of a manufacturer of iron for more than seven months, and it is now uncertain when, if ever, he will be able to fully attend to his usual business, and by reason of such inability to attend to his said business has lost and been deprived of great gains, &c; the use of his said leg has been permanently impaired, and the plaintiff has been otherwise greatly injured. The plaintiff, by reason of the premises, has sustained damages to the amount of twenty thousand dollars, for which he asks judgment.

RICHARD BACON AND F. J. DICKMAN,
Plaintiff's Attorneys.

THE STATE OF OHIO, } *ss:*
Cuyahoga County, }

Richard Bacon, being first duly sworn, says that he is one of the attorneys of the above-named Henry King, duly authorized in the premises; that the said Henry King is a non-resident of said State of Ohio and is now absent therefrom, and that the facts stated and allegations contained in the foregoing petition are true as affiant verily believes.

RICHARD BACON.

Sworn to before me by the said Richard Bacon and by him subscribed in my presence this 17th day of July, A. D. 1880.

A. H. WEED, [SEAL.]
Notary Public.

12 In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Precipe.

To clerk:

Issue summons upon the petition in the above case, returnable according to law. Amount of damages claimed, $20,000.

RICHARD BACON AND F. J. DICKMAN,
Pl'ff's Att'ys.

And afterwards, to wit, on the 29th day of November, A. D. 1880, the following answer was filed in said cause in said court, viz:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Answer.

Now comes the said defendant, The City of Cleveland, and for its answer to the petition of the said plaintiff, Henry King, says: It admits it is a municipal corporation duly created, organized, and existing under the laws of the State of Ohio, and located in the county of Cuyahoga, in said northern district of Ohio, in the eastern division thereof. It admits that at the time of the committing of the alleged injury in said petition mentioned there was, and from thence hitherto has been, a certain public street in said city called Bank street, but as to the remaining allegations in
13 said petition contained said defendant denies each and all of the same to be true and requires strict proof thereof; and said defendant further says that if said plaintiff was injured, as alleged in said petition, it was on account of his own negligence and not by reason of any want of care on the part of said defendant. Wherefore said defendant prays that it may go hence with its reasonable costs.

By HEISLEY, WEH AND WALLACE,
Attorneys for Defendant.

THE STATE OF OHIO, } *ss:*
Cuyahoga County, }

John T. Weh on his oath says he is an agent and officer of the said defendant, the same being a municipal corporation situated in the said county of Cuyahoga and State of Ohio, and that the allegations contained in the foregoing answer are true as he believes.

JOHN T. WEH.

Subscribed in my presence by the said John T. Weh and by him sworn to before me this 29th day of Nov., A. D. 1880.

W. E. SHERWOOD, [SEAL.]
Notary Public.

And afterwards, to wit, on Wednesday, April 29th, A. D. 1885, and on each of the days following, being days of the April term, A. D. 1885, of said court—present, Judge Welker—the following proceedings were had in this cause in said court, viz:

Jury Impanelled.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant.

This day came the parties, by their counsel, and a jury be-
14 ing called, come, to wit, John J. Dodge, L. G, King, Levi Griffith, John Cole, F. D. Carr, G. F. Hutchings, H. Campbell, B. F. Lewis, W. W. Arrell, George Fresh, G. B. Smith, and Samuel Bell, who, being elected, were duly impanelled and sworn and affirmed to well and truly try the issues joined between the parties, and thereupon the trial of this cause proceeded. The plaintiff's testimony was begun but not closed, when the further trial of this case was postponed until to-morrow.

Continuation of Trial.

THURSDAY, *April 30th.*

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn and affirmed herein, and the trial of this case proceeded. The plaintiff's testimony-in-chief was closed, when the further trial of this case was postponed until to-morrow.

FRIDAY, *May 1st.*

This day again came the parties, by their counsel, and also came the jury as heretofore impanelled and sworn and affirmed herein, and the trial of this case proceeded. The arguments of counsel were begun but not concluded, when the further trial of this case was postponed until to-morrow.

SATURDAY, *May 2nd.*

This day again came the parties, by their counsel, and also came the jury as heretofore impanelled and sworn and affirmed herein, and the trial of this cause proceeded. The arguments of counsel were concluded, and the jury, having first received their instructions from the court, retired for deliberation in charge of the marshal; but, not having agreed upon a verdict at the hour for adjournment, the further consideration of this case was postponed until Monday next.

Jury Dismissed.

And afterwards, to wit, on Monday, May 4th, A. D. 1885,
15 the following order was issued in this cause in said court, viz:

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn and affirmed herein, and thereupon said jury, upon inquiry from the court, having announced to the court that they are unable to agree upon their verdict, it is ordered that they be discharged from any further consideration of the case, and the same is continued until the next term of this court.

And afterwards, to wit, on the 6th day of October, A. D. 1885, the following amended petition was filed in said cause in said court, viz:

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Amended Petition.

And now comes the plaintiff, Henry King, and avers that at the time of the commencement of this action and at all times hereinafter mentioned he was a citizen of the State of Pennsylvania; that the defendant, The City of Cleveland, was and is a municipal corporation, duly created, organized, and existing under and by virtue of the laws of the State of Ohio, a citizen of said State of Ohio, and located in the county of Cuyahoga, in the eastern division of the northern district thereof; and, complaining of said defendant, the plaintiff says that before and at the time of the committing of the wrongs and injuries hereinafter mentioned there was and from thence hitherto has been a certain common public street and highway in said city of Cleveland, named and called Bank street, for the
16 free passage and travel of all persons on foot and with their teams, horses, wagons, and carriages at all times, and thereupon it became and was the duty of said defendant, as required by the statutes of said State of Ohio in such cases made and provided, to cause said street to be kept open and in repair and free from nuisance; and yet the said defendant, well knowing the premises, heretofore, on the 12th day of November, A. D. 1879, wrongfully placed and permitted to be placed divers large quantities of dirt, sand, rubbish, stones, boxes, and other materials for building purposes in and across said street at or near and before a certain building abutting on the east side of said street, being No. 56, and then owned by one E. Rosenfeld, and negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stones, boxes, and other materials to extend across and occupy more of said street than was reasonable or necessary, to wit, more than one-half of the width of said street at the place aforesaid, and to remain and continue therein on the said 12th day of November, 1879, and during the night time of that day; that said defendant negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stones, boxes, and other materials to so remain and continue in and across said street during the night time of the said 12th day of November, 1879, and after dusk, unprotected and unguarded with a sufficient number of lights or in such a manner as to be distinctly seen by those who might be passing—and in fact the same was permitted to so remain without any signal or light to guard the same or to denote that it was there.

Plaintiff further says that whenever any dirt, sand, rubbish, stones, boxes, or other materials have been placed, permitted to be placed, or allowed to remain in any of the public streets of the city
17 of Cleveland it has ever been the common usage and custom with all persons, and with the defendant, so placing or per-

mitting the same to be placed in said streets, at all times between dusk and daylight, to protect and guard all such dirt, sand, rubbish, stones, boxes, or other materials upon every side or approach with colored signal lights and such other lights as will enable all passers-by to see and to determine the extent of the same; all of which, on said 12th day of November, 1879, the defendant neglected to do, so as aforesaid; and in consequence of the said carelessness, negligence, and improper conduct on the part of said defendant the plaintiff, while lawfully passing along said street, in the night time of said day, in a certain carriage drawn by horses, was then and there, by reason of said dirt, sand, rubbish, stones, boxes, and other materials so allowed to be and remain in said street as aforesaid, overturned with great force and violently thrown upon said street, and one of the plaintiff's legs was thereby fractured and broken and the plaintiff otherwise bruised and injured, and all without fault or negligence on the part of plaintiff; by reason whereof the plaintiff became and was for a long time sick and wholly disabled and has ever since been and now is lame and permanently injured, and by reason thereof he has suffered great bodily pain and mental anguish, and has been obliged to expend a large sum for surgical and other treatment, nursing and care, in attempting to get healed and cured of his said injury, to wit, about the sum of two thousand dollars ($2,000.00); that for more than one year he was wholly unable to attend to his usual business as a manufacturer of iron, during which time he was obliged to employ others to attend to his said business and to
18 pay therefor a large sum, to wit, the sum of ten thousand dollars ($10,000.00); that he has ever since been unable to attend to his usual business as fully as before, and has ever since been obliged to employ others to assist him therein, for which he has been obliged to pay a large sum, to wit, more than twenty thousand dollars ($20,000.00).

That by reason of his inability to attend to his said business he has been deprived of great gains and business profits; that the use of his said leg has been greatly and permanently impaired, and plaintiff has been otherwise permanently injured.

And by reason of the premises the plaintiff has sustained damages in the sum of twenty thousand dollars ($20,000.00), for which he asks judgment against the defendant.

HENRY KING,
By RICHARD BACON AND E. K. WILCOX,
His Att'ys.

STATE OF OHIO, }
Cuyahoga County, } *ss:*

E. K. Wilcox, being duly sworn, says that he is one of the attorneys of the plaintiff in the above-entitled action; that said plaintiff is a non-resident of the said county of Cuyahoga and is absent therefrom; that the statements and allegations contained in his foregoing amended petition are true as he verily believes.

E. K. WILCOX.

Sworn to before me and subscribed in my presence by the said E. K. Wilcox this 14th day of September, A. D. 1885.

[SEAL.] FRANK C. FRIEND,
Notary Public.

And afterwards, to wit, on the 21st day of October, A. D.
19 1885, the following motion was filed in said cause in said court, viz:

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant, } Motion.

Now comes said defendant and moves the court to strike out of the amended petition of plaintiff filed herein, for the reason that the same are irrelevant and immaterial, the words following, to wit:

"Plaintiff further says that whenever any dirt, sand, rubbish, stones, boxes, or other materials have been placed, permitted to be placed, or allowed to remain in any of the public streets of the city of Cleveland it has ever been the common usage and custom with all persons, and with the defendant, so placing or permitting the same to be placed in said streets, at all times between dusk and daylight, to protect and guard all such dirt, sand, rubbish, stones, boxes, and other materials upon every side or approach with colored signal lights and such other lights as will enable all passers-by to see and to determine the extent of the same; all of which on said 12th day of November, 1879, the defendant neglected to do, so as aforesaid."

A. T. BRINSMADE,
Att'y for D'f't.

And afterwards, to wit, on Tuesday, October 6th, 1885, being a day of the October term, A. D. 1885 of said court, the following order was entered in this cause in said court—present, Honorable Martin Welker, district judge—viz:

Leave to File Amended Petition.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Def't.

20 In this cause leave is given the plaintiff to file an amended petition *instanter.*

And afterwards, to wit, on Saturday, October 31st, A. D. 1885, being a day of the October term, A. D. 1885, of said court—present, the Hon. Martin Welker, dist. judge—the following order was issued in said cause in said court, viz:

Motion to Strike Out, &c., Sustained.

This day came on to be heard defendant's motion to strike out from the amended petition filed herein, and thereupon, upon consideration, said motion is sustained.

And afterwards, to wit, on Saturday, October 31st, A. D. 1885, and on each of the days following, being days of the October term, 1885, of said court—present, Honorable Martin Welker, district judge—the following proceedings were had in said cause in said court, viz:

Trial Progressing.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant.

This day came the parties, by their counsel, and a jury being called come, to wit, Eli H. Arnold, Henry M. Crozier, Henry Custer, George Schlebaugh, Israel Morrow, Edward Burnett, Levi Sargent, Charles Harvey, Edwin Oldroyd, Alexander Bruce, Victor Gutzweiler, Sr., and John Laird, who, being elected, were duly impanelled and sworn to well and truly try the issues joined in this case; and thereupon further proceedings in this case were postponed until Monday morning next.

MONDAY, *November 2nd.*

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn herein, and the trial of this cause proceeded. The plaintiff's testimony was begun but not closed, when the further trial of this case was postponed until to-morrow.

TUESDAY, *November 3rd.*

21 This day again came the parties, by their counsel, and also the jury as heretofore impannelled and sworn herein. The plaintiff's testimony-in-chief was closed, when the further trial of this case was postponed until to-morrow.

WEDNESDAY, *November 4th.*

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn and affirmed herein, and the trial of this case proceeded. The testimony was closed and the arguments of counsel were begun but not concluded, when the further trial of this case was postponed until to-morrow.

THURSDAY, *November 5th.*

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn herein, and the trial of this case proceeded. The arguments of counsel were concluded,

and the jury, having first received their instructions from the court, retired for deliberation in charge of the marshal; but, not having yet reported with their verdict when the hour for adjournment arrived, the further trial of this case is postponed until to-morrow.

Verdict.

FRIDAY, *November 6th.*

This day again came the parties, by their counsel, and also came the jury as heretofore impanelled and sworn herein, and said jury, after due deliberation, come again into court and for verdict say:

"We, the jury in this case, being duly impanelled and sworn, do find for the plaintiff, and we do assess his damages to the sum of ten thousand (10,000) dollars.

"LEVI SARGENT, *Foreman.*"

And afterwards, to wit, on the 7th day of Nov., A. D. 1885, the following motion was filed in this cause in said court, viz:

22 In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Motion for a New Trial.

Now comes said defendant, The City of Cleveland, and, within three days after verdict and before judgment, files this its motion for a new trial of the above-entitled cause, and bases said motion on the following grounds:

I. Because of the misconduct of the jury during the trial of said cause.

II. Because of the misconduct of the said plaintiff during the trial of said cause.

III. Because the damages awarded were excessive and appear to have been given under the influence of passion or prejudice.

IV. Because the said verdict is not sustained by sufficient evidence.

V. Because the said verdict is contrary to law.

VI. Because of errors of law occurring at the trial and excepted to by defendant.

VII. Because of newly discovered evidence, material for the party applying, which it could not with reasonable diligence have discovered and produced at the trial.

A. T. BRINSMADE,
Attorney for Defendant.

And afterwards, to wit, on the 1st day of February, A. D. 1886, the following bill of exceptions was filed in this cause in said court, viz:

23 United States Circuit Court, Northern District of Ohio.

HENRY KING, Plaintiff,
vs.
THE CITY OF CLEVELAND, Defendant. } Bill of Exceptions.

Be it remembered that at the term of the said circuit court of the United States for the northern division of Ohio, begun and held in the city of Cleveland, in said State, on the 6th day of October, the said cause came on for trial, and the said plaintiff, to maintain the issues on his part, offered the following testimony:

Deposition of Thomas Elwood.

THOMAS ELWOOD, called on behalf of the plaintiff, being duly sworn, testified as follows:

(By Mr. BACON:)

Q. You live in the city of Cleveland?
A. Yes, sir.
Q. How long have you lived in the city of Cleveland?
A. Going on 42 years.
Q. What has been your business during that time?
A. I have been in the hotel business, restaurant business.
Q. What are you engaged in now?
A. Livery business.
Q. What business were you engaged in in November, 1879?
A. In the livery business.

The defendant, by its counsel, here objected to the introduction of any testimony on the behalf of the plaintiff, on the ground that the petition does not state facts sufficient to constitute a cause of action.

The objection was overruled by the court; to which ruling the defendant then and there excepted.

Q. Are you acquainted with Mr. King, the plaintiff in this case?

24 A. Yes, sir.
Q. How long have you known him?
A. I cannot say just how long I have known Mr. King—ten or twelve years.
Q. When did you see Mr. King during the latter part of 1879?
A. I took him out to show him a pair of horses.
Q. When was that?
A. It was in November, I think, 1879.
Q. When, with reference to the time of Mr. King's accident? Did you see him on the 12th day of November, the day he met with the accident?
A. Yes, sir.
Q. Where did you see him?
A. I seen him in my stable and I seen him in the Kennard House.
Q. Now, go ahead and tell the jury what happened from the time

you saw Mr. King in your stable and in the Kennard House to the time you last saw him on the 12th of November, 1879; in your own way just tell what happened and all about it.

A. Mr. King was speaking to me in regard to a nice pair of quiet horses, and this was some time before this accident happened, and I went to look for the horses and could not find them—could not find the party; and then I took a pair of horses out of my stable and wanted Mr. King to ride after them, to go down to the depot, to show him how quiet they were.

Q. When was this?

A. This was about half past six or a quarter of seven, on the evening of the accident—took a pair of horses to go down to the depot to show Mr. King the horses; he hadn't much time, and I think he was going away that evening, that night, and I started to go down there with him.

Q. Who got into the buggy?

A. Him and me; and we started from St. Clair-street entrance of the Kennard House and went down Bank street on the right-hand side, and it was on the east side going down, until we came to some paper or paper boxes or some such thing as that, probably a hundred or a hundred and fifty feet from the corner, and then I turned over to the left—to the west—a little ways and kept on the road until we came where we had the tip over—the accident.

Q. Now, explain just how it happened, what was said, and all about it.

A. The accident happened—we were—we drove along on this side——

Q. You got on the west side of Bank street?

A. Went along to where the accident happened—tipped over.

(By the COURT:)

Q. Tell us what you saw, what you ran against?

A. We came to where they were building—Mr. Rosenfeld was building a building there, and we came in contact with that and tipped over.

(By Mr. BACON:)

Q. Came in contact with what?

A. With the rubbish that was on the street, whatever it was. There was a pan—a mortar trough—on the west side. I thought I was out of the way of any——

Q. You got down opposite where this Rosenfeld building is and ran onto something—a mortar trough or something of that kind. Now, tell the court what occurred after you struck the mortar trough.

A. We tipped over.

Q. What happened after you tipped over?

A. Mr. King got his leg broke.

Q. Did you fall out?

A. I did, sir.

Q. Which went out first? Tell all about it from the time you struck the mortar box—exactly what happened.

26 A. I will tell it as near as I can get at it. Mr. King, I think, fell out first. He was on the left-hand side. I was driving and it tipped over on his side and he fell out, and I fell out also.

Q. Which way were the horses pointing at that time?

A. They were pointing for the north—for the depot. I was going to the depot.

Q. Now, which wheel struck the mortar box first?

A. I should say the forward wheel.

Q. On your side?

A. On the east side.

Q. That was on the side you were on?

A. Yes, sir.

Q. Mr. King was on the west side of the buggy?

A. Yes, sir.

Q. The front wheel on the right-hand side struck the mortar box, and then what happened?

A. Whether the other wheel hit that or not I cannot say. Then the buggy tipped over and Mr. King fell out and I fell out.

Q. What did you do then?

A. I picked myself up as quick as I could.

Q. Where was Mr. King?

A. Mr. King was on the sidewalk—near it.

Q. Was anybody else there at that time?

A. I did not see anybody. Somebody had caught my horses.

Q. What became of the horses?

A. They were right close by there, sir. I think Mr. Meade caught the horses. They did not offer to run away, I know.

Q. Where did Mr. King fall?

A. He went right onto the sidewalk—I should judge right close onto the sidewalk.

Q. Where did you next see Mr. King after the horses were taken care of and after you got up?

A. I got a carriage for him and put him into it.

27 Q. Where did you next see him—where was it?

A. After what?

Q. After the buggy tipped over.

A. I seen him and helped put him into the carriage.

Q. How far was Mr. King, at the time you saw him, from the west side of Bank street?

A. Well, I think that he was right over near the sidewalk.

Q. How far was Mr. King from the west end of the mortar box?

A. Probably about twenty-five feet—twenty-four feet.

Q. Then how far did the material extend out into the street—in other words, how much of the street was obstructed by the mortar trough and sand and other material that was there?

A. I did not measure that side of it, but there was one side of it that was measured.

Q. As near as you can tell, how far was it?

A. From the west side?

Q. No; from the east side. How much of the street was occupied by this mortar trough and sand and rubbish and other stuff that was there—building material?

A. How wide is the street; sixty feet, is it?

Q. How much of the street was occupied, from what you can remember of it?

A. Well, I should think there was 45 feet of it—45 feet or more.

Q. What became of Mr. King after he was tipped out of the buggy?

A. Well, he was on the sidewalk and a carriage came along.

Q. What was his condition when you first saw him on the sidewalk?

A. He said he thought his leg was broken. He could not stand up.

Q. What did you do then?

A. I said I would have a carriage as quick as possible for him. A carriage came along and I stopped the man. He said, "I
28 have to go to the depot." I says, "You can't go to the depot. I have a man here with his leg broke and I am going to put him in and take care of him."

Q. You put him in the carriage?

A. I helped put him in.

Q. What became of him then?

A. He went to the Kennard House.

Q. What kind of a night was it?

A. It was dark—quite a dark kind of a night.

Q. State whether or not it had been raining.

A. It looked like rain. I don't think it was raining at that time, but it looked very much like rain.

Q. You may state whether or not there was any light upon that obstruction at the time you went into it and was tipped over.

Objected to.

Q. State the fact, whether or not there was.

A. There was no light there, sir.

Q. How fast were you driving?

A. Well, we were driving very slow—very slow—a slow jog.

Q. About how fast?

A. Not over four miles an hour—not as fast as that. I did not have very far to go and I was not driving fast; only went to show Mr. King the horses down to the depot.

Cross-examination by Mr. SHERWOOD:

Q. Where, with reference to the Kennard House, is your livery stable?

A. Just a little this side of it—east of it.

Q. Next east of the Kennard House?

A. Yes, sir.

Q. You do a general livery business?

A. Yes, sir.

Q. You have carriages going to the depot?

A. When they are ordered; yes, sir.
Q. You have occasion frequently to go to the depot yourself?
A. Yes, sir.
Q. In going to the depot you frequently go up and down Bank street?
A. Yes, sir.
Q. How long have you been located there where you are now?
29 A. Over twenty years.
Q. You are well acquainted with the property around there?
A. Yes, sir.
Q. You knew of this block Mr. Rosenfeld was building there?
A. Yes, sir.
Q. You had seen the building material out there?
Objected to.
A. I seen the building there; yes, sir.
Q. You knew a building was being constructed there?
A. Not just at that time; I did not see it.
Q. You had seen it?
A. Oh, yes.
Q. You knew the building was being constructed?
A. Yes, I knew it. It was probably a week before I saw it the last time. Sometimes I did not go down to the depot in ten or twelve days, and it was two months and over often I didn't go.
Q. You knew Mr. Rosenfeld was building a new block?
A. Yes, sir.
Q. What had you done the afternoon of the day you drove down there?
A. I think I went out to look after a pair of horses that I was to find for Mr. King—looking after a pair.
Q. You were looking after them that afternoon?
A. I think so; yes, sir.
Q. What time was it when you started from the Kennard House with Mr. King?
A. It may have been half past six, it may have been a quarter to 7; along there; I could not exactly say what time; about that time.
Q. You say it was a pretty dark night?
A. It was dark; yes, sir.
Q. And you were taking him out to show him the team?
A. I was taking him down to the depot, sir. I did not want to drive.
30 Q. You were taking him down to the depot, and he was going off?
A. He was going away that night, sir.
Q. You were taking him down for the purpose of taking the train were you?
A. No, sir.
Q. You were taking him down to show him the horses?
A. That is it.
Q. What kind of horses were they?

A. They were a very gentle pair of horses.
Q. Not as to that. What color were they?
A. A brown and a bay, I think they were.
Q. How heavy horses were they?
A. They weighed about ten hundred—in the neighborhood of ten hundred; may be a little more than that.
Q. They were hitched to a light buggy?
A. Yes, sir.
Q. A covered or open buggy?
A. It was a covered buggy—a top buggy.
Q. You say it was raining?
A. It looked like rain.
Q. Sprinkling some, was it not?
A. It may have been; I am not certain.
Q. The top was down?
A. The top was down when we started; before we started I think the top was put up.
Q. You remember your testimony on the last trial of this case?
A. I don't know as I remember every word of it.
Q. Don't you remember testifying that the top was down at that time and remained down?
A. It may have been.
Q. And it was raining at the same time?
Q. Did I say it was raining at the same time? It may have been. It may have been raining some, for I have not had any talk with anybody about my testimony in any shape.
31 Q. Now, which do you say would be correct?
A. I say it was raining. The top was put up. If I was to bring a buggy to you——
Q. That is not an answer to my question.
A. I was going to tell you how it would be——
Q. You are just arguing what you probably would do.
A. No; what I would do.
Q. Can you state from recollection whether or not it was raining?
A. I do not think it was raining very hard.
Q. Now, can you state from your personal recollection as to whether or not that buggy top was up or down?
A. I make it a point to put the buggy top——
Q. Never mind what you make it a point——
A. I think it was down and then put up, sir.
Q. Do you know?
A. That is my recollection of it.
Q. Have you any definite recollection with reference to it?
A. That is my recollection of it.
Q. Is there anything definite about that recollection?
A. If it was raining, then that would be pretty strong.
Q. Do you remember anything about it?
A. Certainly, I do.
Q. Do you know where the buggy top was put up?
A. At the Kennard House.
Q. After you got in?

A. Yes, sir; after Mr. King got in.

Q. And that, you say now, is your recollection of that occurrence?

A. Yes, sir.

Q. Then you drove down Bank street—turned the corner and you drove north on Bank street?

A. Yes, sir.

Q. Now, did you see that paper that was there just in front of you?

A. I did not see it.

Q. How did you happen to turn farther over?

A. The horses made a noise and Mr. King said something and I said, "You needn't be afraid. We will get out of
32 here." So I made away from the paper. It was a paper box or something thrown out by somebody cleaning house or something, and I got farther over and went over to the west side of the——

Q. Now, you did not see this obstruction at all until you got right onto it?

A. Which?

Q. The paper and stuff in the street.

A. I did not see it.

Q. It was so dark you could not see it?

A. It was so dark I could not see it.

Q. And you turned off to the west and went over onto the westerly side of the street?

A. Yes, sir.

Q. How near to the westerly curb-stone did you go?

A. Well; I could not tell you just how near to the west curb-stone I went, sir.

Q. Can you tell anywhere near?

A. I probably went over as far as I ought to go over to let other teams go by me.

Q. In driving over onto the west side of the street did you drive near enough to see the west curb-stone?

A. I do not think I could see it. I do not think I could see the west curb-stone. It was too dark.

Q. How near should you judge you went to it?

A. Might have been thirty feet, sir; might have been twenty-five feet.

Q. And you could not tell?

A. No, sir.

Q. There were no lights along there?

A. On the street?

Q. On the street.

A. If there was they were very dim lights at that time.

Q. No gas lamps lit?

A. There might have been; I ain't certain whether there was or not.

Q. Were there any lights in the store windows along there?

33 A. Store windows? There is not many stores there on the west side.

Q. It does not make any difference whether there were or not.

A. There is no stores there until you would get down to the corner, and the dry-goods stores are generally closed up at that time of night.

Q. I am asking you a simple question, whether there were any lights in the store windows there?

A. I did not see any, sir.

Q. Were there any lights so that they cast a reflection out on the curb-stones and road so you could see it?

A. No, sir; they are most all dry-goods houses.

Q. Just tell me the fact whether or not there were lights there.

A. No, sir.

Q. There were none?

A. No, sir.

Q. And nothing threw any light upon the street there at all?

A. No, sir.

Q. Was there any from St. Clair street to Johnson street?

A. I think there may have been a light on the corner of Johnson street.

Q. Do you know whether there was or not?

A. No; I ain't certain of that.

Q. You did not see any light that night, did you?

A. I do not remember seeing a light that night.

Q. It was as dark as a pocket all along there?

A. It was dark, sir.

Q. Could you see a buggy approaching from the other direction?

A. Why, yes; a man could see probably when he was looking out for such a thing as that. He could see it come along—hear it.

Q. You were not looking out for anything of that kind, were you?

A. I was driving my team.

34 Q. But you were not looking out for anything of that kind—any obstructions in the way or any buggies coming or anything else?

A. I never had any accident——

Q. That is not answering my question. Were you looking out for anything?

A. What was I driving my team for? I was driving my team and looking out to have it taken care of, of course.

Q. Were you looking out for anything in the road, either teams or anything else?

A. Certainly; that is a funny question to ask me.

Q. Answer the question. Do not argue here with me.

A. Yes, sir.

Q. How far ahead could you see?

A. Could not see very far.

Q. Then you could not see a buggy coming up in the opposite direction, could you?

A. If a buggy should come onto me pretty close both of us would have to stop; could not see one another.

Q. It was just such a night as that?
A. It was just such a night.
Q. In driving along the street it was necessary to stop in order to let the teams go by?
A. Stop and pull more to one side.
Q. You could not see them until they would get right onto you?
A. No, sir.
Q. Still you were driving those horses on a trot?
A. A very slow jog, sir.
Q. You were going down that dark street?
A. Yes, sir.
Q. And driving a very slow jog?
A. Yes, sir.
Q. They were off a walk all the while—on a trot?
A. No; not off a walk all the time; no, sir.
Q. You and Mr. King were engaged in conversation with reference to this team, were you not?
A. Well, not just then. I was going to show him the team down to the depot; that is all the conversation. I wanted to show
35 him the team; show him they were a good, quiet pair of horses.
Q. You were wanting to sell the horses?
A. Yes, sir.
Q. You were interested in making a good impression?
A. Certainly.
Q. You wanted to show him they could step off nicely?
A. No, sir; did not do any stepping. He wanted to go down to the depot, and I wanted to take him down to the depot to show him the horses—how quiet they were.
Q. Did you testify before you could see on that night an object in the street across this room?
A. May be I could if it was light enough; if there was a light in the store I could see that far, but these places along there were dark.

By the COURT:

Q. Answer what you said before on this subject.
A. I think before I said I thought I might see that far, across the room.

(By Mr. SHERWOOD:)

Q. As the light was on that street at that time you testified that you could see as far as across this room, did you not?
A. I think I did, sir.
Q. Do you mean to be understood as saying that there were no lights in the buildings along the street or that you did not notice any?
A. I mean to say that is a part of the city that is not lighted up at night.
Q. That is not the question. I am calling your attention directly to the lights on this evening. Do you want to be understood as

saying positively that there were no lights in the buildings along the side of the street or simply that you did not notice any?

A. There were no lights in the buildings that would show
36 light out on the street in that part of the city. There might be lights in the buildings—in the center of those large buildings—might be lights there, but would not show any lights out on the street.

Q. Did you notice any lights at all?

A. I do not remember.

Q. You cannot say, then, from recollection whether or not there were lights in the buildings at all?

A. I know there was a light in one building there.

Q. What building was that?

A. The drug store.

Q. Where is that?

A. Right on the corner of Bank street and St. Clair.

Q. Did not that cast a light out onto the curb and over into the street?

A. It was down farther than that where we got mixed up with the paper box or paper or whatever it was; down a little further, down near Mr. Ellis' place, the auctioneer.

Q. Do you know whether the gas was lit on the lamp-post on the corner of Johnson St.?

A. I ain't certain about that; I told you that before, that I was not certain about that.

Q. What is your impression in reference to it?

A. If it was not lit it ought to be.

Q. What do you know about it on that night?

A. I told you I don't remember.

Q. When you testified before it was your impression the lamp was lit at the corner of Johnson street, and it is still your impression, is it not?

A. It may be now.

Q. Do you know how far this obstruction was from that lamp-post?

A. Not very far; probably thirty or forty feet; may be that far and may be farther.

37 Q. Do you want to be understood as saying that the light from this lamp-post is not sufficiently strong to disclose this obstruction in the street thirty or forty feet away?

A. No.

Q. It did not?

A. No; if you were ever down that way you would find out how the gas is sometimes.

Q. If there had been a light on this obstruction you would have had no difficulty in seeing it, I suppose?

A. I should think not, sir. I should not run over it if there had.

Q. What sort of a box was it you ran over?

A. Well, it might have been a box and it might have been a sand pile. I think it was a mortar box.

Q. Do you know which it was?

A. I would not be certain. I think it was a mortar box we ran over.

Q. One wheel went right over it?

A. There might have been two wheels gone over it—the west wheel. I do not know as we had a chance to get the two wheels over before we got tipped over.

Q. At any rate, one wheel went over it?

A. Went onto it.

Q. Did it get on top of it?

A. On the corner of it; on the west corner.

Q. The off fore wheel went over the west corner of the mortar box?

A. The off forward wheel.

Q. Went over the west corner of the mortar box?

A. Yes, sir.

Q. It would be the southwest corner, would it not?

A. Well, I should judge so; yes, sir.

Q. You should judge that is about the way it went?

A. Yes, sir.

Q. How high should you judge it raised the forward wheel in order to tip over the buggy? What sort of a buggy was it you were in?

38

A. It was a top buggy.

Q. Phaeton—one of those phaeton carriages?

A. It was an end-spring buggy; a good strong buggy.

Q. Do you know how high the obstruction was you drove over?

A. I know—about the hight of a mortar box generally.

Q. How high was that?

A. Probably a foot or sixteen inches.

Q. The buggy wheel went right over the corner of it, didn't it?

A. Yes; either went over that or over something else.

Q. If it struck the box at all it went over that mortar box?

A. Yes, sir.

Q. And went over with such force that it keeled the buggy right over? Threw the horses, did it?

A. No, sir.

Q. Did not throw either of them?

A. No, sir.

Q. You were on the off side?

A. I was on the east side.

Q. The east side of the buggy?

A. Yes, sir.

Q. As a livery man you understand the off and near side?

A. A good many farmers know more than I do about the off and near side.

Q. You were on the right-hand side?

A. Yes, sir.

Q. How were you thrown out?

A. Well, I got thrown at the same time that Mr. King did.

Q. How were you thrown? How did it affect you?

A. I got hurt a little.

Q. That is not what I asked you. Did it throw you head first or feet first, or bodily right down onto the ground? How did you strike the ground?

A. I think I struck the ground on my arm. I think I did. I ain't certain how I did strike it. I might have jumped if I got a chance.

Q. Do you know whether you did jump or not?

A. I know I should try to jump if I didn't.

Q. But you have no recollection of the manner in which
39 you got out of that buggy?

A. No, sir; it is a pretty hard place to be—was at the time.

Q. How far did the horses go after you struck that?

A. Did not go very far; might not have went five feet and might have went ten.

Q. You have no recollection?

A. They did not go by the corner.

Q. Did they drag you?

A. Might have dragged me a little at the time; might have pulled me a little.

Q. You don't remember?

A. I ain't certain. I think I had the lines in my hand; pretty sure I had the lines in my hand.

Q. But you do not remember about that?

A. I know the horses were very quiet; stopped at whoa.

Q. Do you remember telling them to stop?

A. I did not tell them to go ahead.

Q. I am not asking you what you might have said or done on the occasion. I simply ask you to answer my question. Did you tell them to stop, do you remember?

A. Yes, sir; I should tell anybody to stop that was going.

Q. Do you know whether you did or not? I am not asking what you would have done or should have done, but what you did. I want your recollection of it; that is all.

A. Yes, sir.

Q. Do you remember distinctly telling them to stop?

A. Yes, sir.

Q. You are not certain whether more than one wheel struck that box or not, are you?

A. No, sir.

Q. Some one took hold of the horses then and you went to Mr. King's assistance?

A. Yes, sir.

Q. Where was Mr. King when you came to him?

A. He was on the sidewalk or near it; on it probably. I
40 think he crept onto the sidewalk.

Q. Where was he when you came to him?

A. On the sidewalk.

Q. Did you let go as soon as the horses stopped and go and look after Mr. King?

A. As quick as the horses stopped; yes, sir.

Q. Did you stop the horses or were they stopped by some one else? Who took them by the bits?

A. I stopped the horses. I know the horses stopped after I let go; they might have went along a little ways, and somebody got hold of the horses; Mr. Meade, I think it was.

Q. But you went to Mr. King's assistance as soon as the horses stopped?

A. Yes, sir.

Q. Now, how long was it after the buggy was tipped over before you stopped the horses?

A. It could not have been very long; it could not have been over five or six seconds.

Q. And you think Mr. King was thrown pretty well over towards the curb?

A. Yes, sir.

Q. What was the distance between the outside of the obstruction to the westerly side to the west curb?

A. Between twenty-four and twenty-five feet, I think, sir.

Q. Then if that street is a sixty-foot street there could not be 45 feet of rubbish in there or of obstruction?

A. How wide is the street?

A. We will call it 60 feet.

A. No, it could not be, sir.

Q. It would only leave about 35?

A. That is right, sir.

Q. How much room do you need to drive a buggy through ordinarily?

A. Can drive a buggy through five feet; six feet easy.

Q. How many feet from the westerly curb do you suppose Mr. King was when he fell?

A. When he fell out of the buggy?

Q. Yes, sir; when he struck the ground. Pretty well over 41 the west curb, you say?

A. Yes, sir; pretty well over to the west curb.

Q. About how far from the west curb should you think?

A. Well, with him trying to jump, or if a man tried to jump or if he fell out, it would take some distance where he would land.

Q. Where did he land on the ground?

A. I should judge he would land near the curb, from the tip over.

Q. When he first struck the ground, as he was turned from the buggy, he landed near the west curb?

A. I think so.

Q. About how many feet should you judge?

A. Might have been three or four feet of it.

Q. You are pretty sure you went over the top of the obstruction, whatever it was, whether it was sand or a mortar box?

A. Yes, sir.

Deposition of Matthew Meade.

MATTHEW MEADE, a witness on the part of the plaintiff, being duly sworn, testified as follows:

(By Mr. BACON:)

Q. How long have you lived in Cleveland?
A. Over thirty years.
Q. What is your business?
A. Blacksmith.
Q. Do you remember the night Mr. King met with this accident, in November, 1879?
A. I do.
Q. Where were you at the time the accident happened?
A. Right on the spot.
Q. Did you see Mr. King before the accident happened?
A. I did.
Q. You may tell under what circumstances you saw him.
A. I was down at Mr. Elwood's barn that same night, and I was going down to the Lake Shore House.
Q. Where is the Lake Shore House?
A. On Bank street, right below Lake street; and I went—passed along the Kennard House, and Mr. King was getting into the
42 buggy along with Mr. Elwood. That was the first time I ever saw Mr. King in my life.
Q. You saw Mr. King get into the buggy with Mr. Elwood in front of the Kennard House?
A. Yes, sir.
Q. What time was this?
A. I think this was a little before seven o'clock. I could not exactly tell what time.
Q. After Mr. King got into the buggy what did Mr. King and Mr. Elwood do?
A. I walked on then and left them there for-ninst the Kennard House. I walked by and went on.
Q. What did you do?
A. I went over and went down Bank street.
Q. When did you next see Mr. King and Elwood?
A. Right when they was tipped over.
Q. Under what circumstances? Tell the whole thing.
A. I was walking along Bank street, and when I got opposite Johnson street there was a pile of broken stones that had been chipped off of foundation stones, and there was brick there, and I could not see no light, and I——

Objected to.

Q. What happened there?
A. Well, the first thing, I was walking along and I heard the horses and buggy in this paper and then on the stone chippings, and the next thing they struck the mortar box, and the buggy was tipped over, and the two fell out, and I ran and grabbed the horses.
Q. Did you see Mr. King there?
A. I did.
Q. Now, describe the situation of Mr. King.
A. Well, I grabbed the horses and Mr. King was dragging him-

self across the street to the corner of Johnson and Bank street, and I could hear him groan, and when I grabbed the horses Mr. Elwood——

43 Q. Where were you, with reference to the carriage, when it tipped over?

A. I was right opposite.

Q. What did you do when you saw it tip over?

A. I ran and grabbed the horses.

Q. It was after you saw Mr. King across the street?

A. When I had the horses by the head I saw Mr. King dragging himself.

Q. Which direction were you going?

A. I was going towards the depot.

Q. How far away were you from the buggy when it tipped over?

A. I was about thirty-five feet, pretty near; in that neighborhood.

Q. When did you next see Mr. Elwood after the buggy tipped over?

A. After I went up to them Mr. Elwood said, "Is that you, Mat.?" I said, "Yes, sir," and I took the horses and went over towards where Mr. King was.

Q. Can you tell us how the buggy struck that mortar trough?

A. The off forward wheel struck it first.

Q. Did more than one wheel strike the mortar box?

A. That I could not say. The buggy went over, anyway.

Q. The first thing you knew after it struck was the buggy went over?

A. Yes, sir.

Q. What sort of a night was it?

A. It was a dark, hazy night.

Q. What did you say as to whether or not there was a light marking that obstruction?

A. There was no light.

Q. What, if any, signal lights were there on Bank street?

A. I did not see any.

Q. What did you do after you had taken hold of the horses?

A. Well, there was some gentleman—some man came upon the sidewalk, I don't know who the man was, and I called him; I could not see anybody else on the street, and he helped me to tip the buggy back.

Q. What became of the horses?

44 A. I took them up to Elwood's barn.

Q. What became of Mr. King before you took the horses up to the barn?

A. There was a carriage came there for Mr. King. I don't know how they got him in it; I did not see him because I went off with the horses.

Q. Did they carry Mr. King off first—before you took the horses back, or did you go first?

A. I did not go with Mr. King at all.

Q. When you took Elwood's horses back to the barn had Mr. King been taken away?

A. The carriage was there when I went by with the horses. I was leading the horses by the head.

Q. Now, you may state if you saw the scene of the accident again. When were you there next?

A. I left the horses in Elwood's barn, and the cushion of the buggy was gone, and I came back again to look for the cushion.

Q. How long after the accident was that?

A. About five minutes. I did not stay more than five minutes in Elwood's barn.

Q. Just time to go to the barn and back again?

A. An- back again.

Q. How far was it to the barn?

A. I could not exactly tell the distance.

Q. How long would it take you to go there?

A. I could walk it in less than five minutes, anyway.

Q. How long were you gone from the time you left the obstruction where the accident happened and went to the barn and discovered the loss of the cushion and came back to see if you could find it—how long would you say?

A. That was about fifteen minutes.

Q. How much of a search did you make there after the cushion?

A. Searched around the mortar tub and all around, and could not find anything. I had some matches in my pocket and struck them—lit them to look around there.

Q. Was there a light upon that obstruction when you went back there to hunt for the cushion?

A. No, sir; there was not or I would have seen it.

Q. State whether there was one.

A. No, sir.

Q. How long did you search for the cushion?

A. I searched for it a couple of minutes or three; I guess I looked all over and could not see it.

Q. How careful a search did you make?

A. I searched all around there; looked into the mortar tub to see if it was there. I thought it might have fallen into the mortar tub.

Q. The mortar tub was the place where you say the forward wheel of the buggy struck when it tipped over?

A. Yes, sir.

Q. How high was that mortar tub?

A. I did not measure it.

Q. How high should you think it was? Give us an idea about how high it was.

A. It must have been twelve or fifteen inches high—that or more.

Q. Was there any water in it when you looked in there for the cushion?

A. That I ain't able to tell.

Q. Was there any rubbish between the end of the mortar box and the west side of Bank street?

A. Not on the street.

Q. Describe the position of the mortar box with reference to the rest of the street.

A. The mortar box stood there. There was a heap of bricks on that side of the mortar tub, and broken stone was on this side of the mortar tub, and the mortar tub stood out the same as that desk outside the broken stone and outside the brick a little.

Q. How far was it from the end of the mortar tub to the west curb of Bank street?

A. I don't know the width of the street. I never measured
46 it. I should think from the east end to the end of the mortar tub was about thirty-five feet.

Q. From where?

A. From the east side to the west.

Q. That is, there would be about thirty-five feet of street that was occupied with the obstruction?

A. Yes, sir.

Q. Now, how far was it from the end of the obstruction to the west side of Bank street?

A. I do not know; it is pretty hard to tell.

Q. You have got about thirty-five feet occupied. How far was it from the end of the mortar box, in the clear?

A. About twenty-five feet, I think. I would not be positive, but I think about that from the end of the mortar box to the end of the curb-stone on the other side.

Q. Where was Elwood at the time you first saw him after the accident happened?

Ans. He had the horses; had the lines in his hand.

Q. Where was he with reference to Mr. King?

A. Mr. King was down and was dragging himself.

Q. How far from the curb on the west side of Bank street was Mr. King when you first saw him?

A. I think he could not have been more than fifteen feet.

Q. From the west side?

A. No.

Cross-examination by Mr. SHERWOOD:

Q. Where do you live?

A. 680 Detroit street.

Q. Did you live there at that time?

A. I did not.

Q. Where did you live at that time?

A. On Champlain street.

Q. Where had you been that evening?

A. I was working all day, and took my supper that evening, and went down to Tom Elwood's on that evening, straight from the house.

Q. How long had you been at Elwood's?

A. I was not at Elwood's more than a quarter of an hour, anyway.

47 Q. Had you business with him?

A. Not a bit.

Q. Was he there at the time?

A. He drove in with a team of horses while I was there and drove

out again while I was there. He was going to show them to a man to sell.

Q. Then where did you go?

A. Walked out along St. Clair street over by the Kennard House.

Q. Where did you start for?

A. Started for the Lake Shore House.

Q. Did you have business there?

A. Had a friend there I was going down to see.

Q. Did you start to see your friend when you left home in the evening?

A. I did.

Q. You expected to see him?

A. Yes, sir.

Q. And took in Elwood's on the way?

A. Yes, sir.

Q. Now, at which entrance of the Kennard House did Mr. King get into the buggy?

A. I did not look at the entrance at all; I seen him on the sidewalk.

Q. On what street?

A. On St. Clair street.

Q. What kind of a buggy was it?

A. It was a top buggy with a pole in.

Q. Single or double seat?

A. A one-seated buggy.

Q. A light buggy?

A. Middling.

Q. Was the top up or down?

A. The top was down.

Q. Now, when you righted the buggy up after it had been tipped over was the top up or down?

A. The top was down.

Q. Did you put it down?

A. Me put it down? I did not touch the top at all.

Q. Did you see any one put it down?

A. I did not, except the man that helped turn it over.

Q. Did he put it down?

A. I could not swear that.

48 Q. You got there first, did you not?

A. I got there to the horses' heads first, but I did not get at the buggy first.

Q. You did not get into the buggy first?

A. I did not get into it at all.

Q. You helped him turn the buggy up?

A. The man turned the buggy up and I stood and held the horses.

Q. Tell us whether the top was up or down when you first got there?

A. I could not tell.

Q. Who was that man that helped you?

A. I do not know his name.

Q. Did he get into the buggy?
A. He did not; he went away.
Q. Was any one in the buggy when you took off the horses?
A. Not one.
Q. What did you do with the buggy?
A. Brought it up and left it in Elwood's barn.
Q. You went back with both the horses and buggy to Elwood's barn?
A. I did that.
Q. How far from Johnson street were you when you saw the buggy tip over?
A. Right opposite.
Q. Did the accident occur right opposite Johnson street?
A. Just the same as if the crossing was here (indicating) and you would walk across. It was not exactly opposite Johnson street where it occurred; it was a little to the south more. There was a cross-walk that goes across the southwest corner of Johnson street, and it was here, about on that spot, where the accident happened.
Q. Just about on the cross-walk?
A. Just about on the cross-walk. I guess at that time there was no stone walk put across there.
Q. Was there a lamp-post on the corner of Johnson street?
A. I do not know. I saw a lamp burning on Johnson street.
49 Q. Was there one on the corner of Johnson street?
A. I do not know. I did not see no light.
Q. How far were you from the buggy when it tipped over?
A. I was about thirty-five feet, I think. I was right opposite.
Q. Were you near the curb-stone?
A. I was that.
Q. On the outside of the sidewalk?
A. On the east side.
Q. And the buggy when it tipped over was about thirty-five feet from you?
A. Yes, sir; about that.
Q. Could you see it distinctly?
A. I could not see it distinctly until I got over to it.
Q. You heard it?
A. I heard it plain enough.
Q. But could you see the horses and buggy?
A. Not quite, until I got over to it.
Q. You could not see it?
A. I could discern them, but I could not see them plain.
Q. You could tell there was an object there.
A. Of course I could.
Q. Could you tell whether it was a horse and buggy?
A. I could tell it was a buggy and horses, and because I knew by the sound it must be a buggy.
Q. Could you tell without lights whether it was a buggy or not?
A. Yes, sir; I could.
Q. You could not see the horses there, could you?
A. I could discern the thing for-ninst me.

Q. Were there any other lights there?
A. I did not see any other lights.
Q. You don't know whether there were any other lights there?
A. I did not see them. I did not see a light on Bank street that night.
Q. You could have seen them if they had been there?
A. I could that; if they had been there I could have seen them.
Q. Do you know where Schnepbach's place is, right next to Mr. Resenfeld's block?
A. I do not know. I do not know him at all.
50 Q. Do you know whether there was any light in that window or not?
A. I do not.
Q. Do you know whether there were any other lamp-posts with lights on, on Bank street?
A. I seen none.
Q. You did not see any?
A. No.
Q. You did not see a light on Bank street at all?
A. Not on that night. I do not know whether it was the right hour to light lamps at that time or not.
Q. It was dark, was it not?
A. It was pretty dark.
Q. You examined the obstruction the buggy run over, did you?
A. I was not thinking of anything. I went back to look for the cushion.
Q. Then you examined this box?
A. I seen the box.
Q. It was a box about a foot or fifteen inches high?
A. I could not swear to the hight of it, but it was that hight, I think, anyway.
Q. Now, you say on one side of the mortar box there was some sand?
A. I never mentioned sand.
Q. Well, was there not?
A. I did not see any. There might have been, but I know there was broken stone at one side of the box.
Q. That was on the south side of the box?
A. Yes, sir.
Q. So that the buggy came upon the stones first?
A. Yes, sir.
Q. How far was it from where the buggy first tipped over to where you stopped the horses?
A. I guess the horses did not go any at all, because Mr. Elwood held onto the lines. I do not think the horses moved a peg from the time the buggy tipped over.
Q. They were not going at the time you took hold of them?
A. No, sir; I went over and took hold of the horses and Mr. Elwood asked, "Is that you, Mat.?" and I said, "Yes."
Q. How far from the mortar tub was it to where Mr. King
51 was turned out?

A. After he fell on the ground I think he had to drag himself fifteen feet.

Q. Was it raining then?

A. It was hazy; not raining very hard; it was hazy.

Q. But there was a mist?

A. Yes, sir.

Deposition of S. T. Oswald.

S. T. OSWALD, called by plaintiff, being duly sworn, testified as follows:

(By Mr. BACON:)

Q. Where do you live?

A. 144 Lake street.

Q. What is your business?

A. I am a photograph printer.

Q. Do you remember the night of November 12th, 1879, when Mr. King was hurt?

A. Yes, sir.

Q. What, if anything, do you know about obstructions on Bank street where the injury occurred?

A. I know I was asked to go there and make measurements in company with two other gentlemen.

Q. Who asked you to go there?

A. Mr. Elwood.

Q. Whom did you go with?

A. Mr. Elwood's brother John and a man by the name of Frank Day.

Q. What time was that?

A. It was about nine—between nine and ten o'clock, I should think.

Q. What did you find there?

A. We found that the street was obstructed by building material—a mortar box, and such stuff as that.

Q. Now, with reference to the width of the street. You may tell the jury what portion of the street was obstructed and what portion was not.

A. The portion of the street obstructed was the eastern side.

Q. How much of the street was obstructed as compared with its whole width?

52 A. I do not know how wide the street is, but I should think there was over half of the street.

Q. How much more than half?

A. Well, considerable.

Q. Can you estimate in feet how much of an obstruction there was?

A. Well, I cannot say that I could.

Q. Suppose the street was sixty feet wide. How many feet would you say was obstructed and how much clear?

A. There was about forty feet obstructed, I should think, if the street was sixty feet wide.

Q. Do you know that?
A. Well, we made measurements.
Q. Who made them?
A. Elwood, Frank Day, and myself.
Q. What Elwood?
A. Johnny Elwood; Tom Elwood's brother.
Q. You may state, at the time you were there, whether there was a continuous obstruction from the west side of Bank street.

Objected to.

Q. State whether the obstructions were continuous from the east side of the street to the end of the mortar trough.
A. They were.
Q. Now, what was the character of those obstructions?
A. Oh, there was sand, a mortar box, and, I suppose, stone and brick. I did not examine them very particularly to see just what they were.
Q. Could you drive over it?
A. Not very handy. They were about four or five feet high, I should think.
Q. Now, at the time you went down there with Mr. John Elwood and Mr. Day, you may state whether or not there was a light there to mark that obstruction.
A. There was not.
Q. Did you go down there again that night?
A. Yes, sir.
Q. Who was with you that time?
A. A man by the name of Wenbau and another they called "Pop." I believe his name was Holcomb.
Q. Was there anybody else?
A. Frank Day, John Elwood, and myself.
Q. He went down with you, then, twice?
53 A. Yes, sir—that is, the brother of Tom Elwood.
Q. You went down there at nine o'clock and went down there again about 7 o'clock?
A. Somewhere along there; yes, sir.
Q. At the time you went down there at one o'clock state whether or not there was a light there marking that obstruction.

Objected to.

Q. You may state the fact.

Objected to.

Q. What was the condition you found it in, in regard to being light?

Objected to; objection sustained.

Q. At the second time you went down there did you make measurements as to the amount of street that was obstructed?
A. Yes, sir.
Q. Who made the measurements?
A. Well, Frank Day and Holcomb.

Q. Did not Elwood make measurements there?
A. And Elwood, too; yes, sir.
Q. John Elwood?
A. John Elwood.
Q. When you went down there to measure, how far were you from the obstruction in the street before you could see it?
A. I do not know exactly how far. You would have to be almost on top of it before you could see it.
Q. How high was the obstruction at the south end of the mortar box—in other words, how high was the end of the mortar trough?
A. From the street proper?
Q. Yes.
A. About three feet and a half or four feet.
Q. Did you assist in making those measurements?
A. I believe I held the line.
Q. Do you remember exactly, in feet and inches, what they were?
A. No, sir; I do not.

Cross-examination by Mr. SHERWOOD:

Q. What was your business at that time?
A. Photograph printing.
54 Q. Where?
A. Decker and Wilbur. It was E. Decker at that time.
Q. Where were you living?
A. I guess I took my meals at the City Hotel.
Q. When did you first see Tom Elwood that night?
A. Met him in the Ocean.
Q. The Atlantic or Pacific?
A. Neither. The Oyster Ocean.
Q. What kind of a place is the Oyster Ocean?
A. A restaurant.
Q. What else?
A. I suppose, like all of them, it has a bar attached.
Q. What time of night was it?
A. Between half past eight and nine.
Q. Did you meet him in the restaurant or saloon?
A. I do not know which.
Q. Was it there he asked you to go and help measure?
A. I think it was. He did not ask me. He asked his brother. I was in company with his brother.
Q. His brother was in the Ocean with you?
A. We went in there together.
Q. Did you go in to take a swim?
A. I do not know whether we did or not. It is a long time ago.
Q. It was Elwood's brother asked you to go and help make the measurements?
A. Mr. Elwood asked his brother. He asked John to go and make the measurements, and as a natural consequence I was in his company, and I went along.
Q. It was about nine o'clock?
A. I guess it was; yes, sir.

Q. How long had you been around there?
A. In the Ocean?
Q. Yes.
A. We had not been there, I do not suppose, ten minutes.
Q. Where had you been before that?
A. I could not tell.
Q. You do not remember where you were? Did you have anything to drink in there?
A. I do not know whether I did or not.
Q. Don't you remember?
A. I don't recollect. It is an awful long time to recollect about a drink.
Q. Perhaps you can recollect having two or three?
A. No.
55 Q. You do not know whether you did or not?
A. No, I could not swear.
Q. What did you go in there for?
A. I do not know why we went in there. I suppose we just happened to drop in.
Q. Who dropped in with you?
A. Mr. Day and Mr. Elwood.
Q. You do not know what they dropped in there for, either?
A. They dropped in because I did.
Q. Do you know whether they took a drink with you or not?
A. I don't suppose they did. I might have took a drink with either one of them.
Q. That is the way it was?
A. I do not say I did nor that I did not.
Q. Did you have any other object in going in there except to get a drink?
A. Mr. Elwood came to the Ocean, and as a natural consequence his brother wanted to see him. We had been there very often before.
Q. Who extended the invitation to go in?
A. I could not say.
Q. Was Tom Elwood in there with you when you went in?
A. No, sir; he might have been in when we went in, for all I know.
Q. Do you know whether John Elwood wanted to see his brother Tom or not?
A. I do not know whether he had business with him or not.
Q. Did he call for him when he went in there?
A. I could not say.
Q. What did he call for?
A. I could not say that.
Q. You do not know whether he called for the drinks or not?
A. He might have called for beer.
Q. You think he called for beer?

Objected to.

56 Q. How many were there of you who went down there to measure?

A. There was four of us, including Tom Elwood.

Q. Who were they, now?

A. John Elwood, Frank Day, and myself and Tom Elwood.

Q. You all went down there to measure?

A. Yes, sir.

Q. Now, who held the measuring tape?

A. I could not say who did, but I think I held one of them.

Q. Did you have more than one tape?

A. They made more than one measurement. Of course, it was all done with one tape.

Q. Did they make two measurements at that time?

A. I do not know. They made two measurements that night.

Q. Let us have this particular time and get through with it. Who held the measuring tape that time?

A. I could not say who did; I might have.

Q. Do you recollect?

A. I would not swear I did.

Q. Do you recollect?

A. I do not.

Q. Was there any minute made of the distances at that time?

A. There were measurements taken; yes, sir.

Q. That is not what I asked you. Was there any minute made of the measurements?

A. Of the time of night, or what do you mean?

Q. I mean of the distances. Did you put it down in figures on anything—the distances as you found them there?

A. I don't know whether they were put down then or not. They were, later on. The measurements were taken and put down. Whether it was done at the first or second measurements, I would not swear which.

Q. You made a thorough investigation of the surroundings at this time, did you?

A. Yes, sir.

Q. Just tell the jury what was in the street and how they laid.

A. There was sand, mortar box, and all other obstructions.

57 Q. That does not sufficiently describe it. Where was the sand?

A. In the street.

Q. Where in the street?

A. Piled in the street.

Q. What part of the street?

A. On the eastern side, clear out to the mortar box, as near as I can recollect.

Q. How far was it from the eastern curb to the mortar box—all the way?

A. I think so; I ain't sure.

Q. The sand was all at that distance?

A. I did not say sand alone; and the other building material.

Q. What other building material?

A. Lumber and stone.

Q. What kind of lumber?

A. I do not know whether it was dressed lumber or undressed building lumber.

Q. Was it boards, timber, and plank, or what?

A. I don't know. I did not examine it very particularly.

Q. Now, can you swear there was any boards or lumber?

A. I can swear there was a mortar box there.

Q. Is not that all you can swear to?

A. No.

Q. Now, what else was there you can swear to as existing in that street?

A. There was sand.

Q. Can you swear there was a particle of sand?

A. It might have been dirt; might not have been sand.

Q. Was it in a pile?

A. Piled up; yes, sir.

Q. Where was it?

A. East of the mortar box.

Q. Now, are you willing to swear there was a pile of sand east of the mortar box—mud or dirt of any kind?

A. I would not swear to it now.

Q. Do you undertake to tell the jury there was sand or building material of different kinds there?

A. I did not say particularly it was sand. I said building obstructions.

58 Q. What building obstructions were there there?

A. The mortar box was a building obstruction.

Q. You have enumerated several other things that you say were in that street forming a continuous obstruction from the east curb out forty feet into the street. Now, tell the jury what that particular obstruction was, if you can.

A. I do not say I can.

Q. How do you know that there was a continuous obstruction there for 40 feet out in the street?

A. Because I seen it.

Q. What did you see?

A. I seen whatever it was.

Q. You went down there to make an examination and measurements, and you have undertaken to tell the the jury what you saw there. Can you describe it in particular?

A. I cannot. It has been so long ago, I would not undertake to describe it.

Q. You would not be willing to swear there was any sand there? You would not be willing to swear there was any timber or lumber there, would you?

A. Yes, sir.

Q. Where?

A. In the street.

Q. Can you describe it any more particularly than that, and locate the lumber and sand?

A. I would not undertake to.
Q. Was it inside or outside of the mortar box?
A. What inside or outside?
Q. What you have been testifying to.
A. I want to know whether you mean in the mortar box or outside. I do not understand that question at all.
Q. What have you been testifying about?
A. I do not understand that last question.
Q. Now, I ask you whether sand and lumber was in between the east curb and the mortar box or outside in the street from the mortar box?
A. It was on the eastern side of the mortar box, as near as
59 I can recollect.
Q. Was there more than one box there?
A. I do not recollect.
Q. You do not know whether there was more than one box there at all?
A. No; I could not say.
Q. This box that you observed particularly was three feet and a half or four feet high?
A. I should think so.
Q. Did you notice where the buggy struck it?
A. No; I might have that time, but if I did I have forgotten.
Q. What was your object in going?
A. Simply because I was asked.
Q. Why did you go?
A. I said because I was asked to go.
Q. To do what?
A. To go down and make this measurement. At least I was not asked; John Elwood was asked, and he asked me to go along with him.
Q. You were not asked in regard to the character of the material on the street?
A. Only what my attention was called to at the time.
Q. Who called your attention to it?
A. Everybody that was there spoke about it.
Q. Spoke about what?
A. About the street being obstructed and no light there.
Q. Did they speak about the kind of material in the street?
A. Not that I know of.
Q. You did not have occasion to observe very particularly what was in the street?
A. Only the box—the mortar box.
Q. All you wanted to get at was the box, and then you went down again?
A. Yes, sir.
Q. What time was it you went the second time?
A. Between twelve and one; somewhere along there.
Q. After you got through the measurements the first time where did you go?

60 A. I don't know; might have went to the theater the first time; we went back to the Oyster Ocean.
Q. To wash out again?
A. I suppose.
Q. Where did you stay there?
A. I don't know where we went; might have stayed there and might not have.
Q. How did you come to go the second time?
A. Because I was asked to go again.
Q. Who asked you this time?
A. I was to go in company with some other gentlemen.
Q. Who went with you?
A. This man Wenbau, Frank Day, John Elwood, and Tom Elwood.
Q. Where did you start from?
A. Oyster Ocean.
Q. Who held the tape line this time?
A. I do not know whether I did or Frank Day.
Q. Then did you put any figures down or make any memorandum of it?
A. I did not put any figures down, but I signed my name to those that were put down.
Q. Where did you sign your name?
A. On a paper.
Q. Where were you when you signed your name?
A. I guess in the Oyster Ocean; at the bar of the Oyster Ocean.
Q. Did you see the figures on the tape line when the measurements were made?
A. Yes, sir.
Q. And where did you look at them?
A. Went to the lamp lights.
Q. Did you see the figures of the measurements both times?
A. I do not know whether I did or not.
Q. But all the figures that you saw you saw from the reflection of the lamp there?
A. From the gas lamp.
Q. On the corner of Johnson street?
A. Yes, sir.
Q. And when the boys made the measurements they put
61 their finger on the tape, and then went to the gas-light to see how far it was, did they not?
A. I believe so.
Q. Did you notice whether there were any lights in the surrounding buildings?
A. I did not.
Q. You do not know whether there were or not?
A. I did not.
Q. You do not know whether there were or not?
A. No.
Q. How far would you say this lamp-post was from that mortar box?

A. Thirty or forty feet; somewhere along there.
Q. You did not measure that, did you?
A. I do not know whether we did or not.
Q. You have no recollection of the distance- as you found them that night?
A. From the lamp-post or from the mortar box?
Q. Either from the lamp-post or mortar box—west curb to the mortar box. You cannot say as to the exact distances? You do not remember the figures you made that night?
A. No; I do not remember them.

Redirect examination:

Q. You say that the measurements were taken down there with a tape line?
A. Yes, sir.
Q. And you looked on the tape line to see the figures on it?
A. Yes, sir.
Q. Will you state to the jury where you were when you looked at that tape line?
A. We were at the corner there—the corner of Johnson street; took them over to the lamp light—gas jet.
Q. When you looked at the tape line to see the figures on it—it was after the measurements had been taken from the obstructions to the curb-stone—then you went from thirty to forty feet to the lamp-post to see what the distance was?
A. What the distance was.
Q. If you had looked at it where the obstruction was could you have seen what the figures on the tape line were?
62 A. No, sir; not unless you struck a match.
Q. How was the tally kept with the tape line?
A. Why, it was held onto from where they measured it off.
Q. Do you know who held that tape line?
A. I could not say for certain who did. I think I held one of them once, but I would not swear that I did.
Q. But, whoever it was, after the measurement was taken the finger was pressed on the measurement and it was taken over to the lamp-post to see how far it was?
A. Yes, sir.
Q. You may state whether they were put down on the card correctly at the time they were placed there.
A. Whatever they were, they were correct. I know I signed my name to it; they were correct.
Q. Do you know what became of the cards?
A. I do not.
Q. Where did you last see them?
A. Mr. Elwood, I think, took possession of them.
Q. Did Mr. John Elwood sign these cards?
A. I do not recollect. I know I did and Frank Day did. I and Frank were particular friends. We were together almost all the time. He signed and I signed.
Q. What was the object of signing the cards?

A. I suppose Elwood wanted them for future reference. I do not know.

(By Mr. SHERWOOD:)

Q. Could you see the obstruction—this box—from the corner of Johnson street?

A. I do not know whether you could or not.

Q. You did not look to see?

A. No.

Q. From the box you could see the lamp-post?

A. You could not see the post; you could see the light there.

63 *Testimony of John George Wenban.*

JOHN GEORGE WENBAN, called on behalf of the plaintiff, being sworn, testified as follows:

(By Mr. WILCOX:)

Q. Where do you reside?

A. In the city here—Kennard House.

Q. Where did you live in 1879?

A. I was living here then.

Q. I will ask you if you remember the occasion of the accident to Mr. Henry King on Bank street on the 12th of November, 1879?

A. Yes, sir.

Q. I will ask you if you had occasion to go down to the place of the accident that night?

A. Yes, sir; I went down there.

Q. You may state how you happened to go down there.

A. I went down at the request of Mr. Elwood.

Q. Which Mr. Elwood?

A. Mr. Thomas Elwood.

Q. Where did you see Mr. Elwood on that night?

A. Saw him at the Oyster Ocean.

Q. Where is the Oyster Ocean?

A. It is on Bank street.

Q. Near the Kennard House.

A. Yes, sir; just above the Kennard House, towards Frankfort St.

Q. And you went down at his request?

A. Yes, sir.

Q. For what purpose did you go down?

A. To measure the street there—the debris that was in the street.

Q. Who went with you, if anybody?

A. Why, there was Holcomb and John Elwood, Mr. Thomas Elwood's brother, and Mr. Day and Mr. Oswald, I think his name is.

Q. The gentleman that was just on the witness stand?

A. Yes, sir.

Q. At what time in the day or evening did you go down?

A. Between twelve and one o'clock.

Q. Did you go down more than once?

A. No, sir.

Q. What did you do when you went down there?

A. Well, we took the measurements of the street; took
64 measurements of the clearing and space that was occupied by rubbish and stuff.

Q. Who made those measurements, if you remember?

A. Mr. John Elwood and Holcomb and myself. I think I assisted them.

Q. What part did you take in the measurements?

A. I held the end of the tape line, I think.

Q. Can you give the distance from memory that that measured there?

A. No; not exactly. We put the figures down at the time.

Q. On what?

A. On a card. Each signed our name to it.

Q. What did you do with the card?

A. We left it with Mr. Elwood, I think.

Q. If you cannot state accurately you may state as near as you can the portion of the street that was occupied by building material and rubbish of all kinds.

A. Well, I think there was 33 or 34 or 35 feet—somewhere along there—that was occupied by rubbish.

Q. How much of the street was clear for the passage of vehicles?

A. It was a much smaller space than was occupied.

Q. Which side of the street was clear?

A. The west side of the street was clear and the east side occupied.

Q. Do you remember what those obstructions consisted of?

A. Why, there was building material and sand—a pile of sand there—and this big mortar box they had used; it was apparently thrown on the sand and slid down. I think that the extreme outer edge——

Q. You think the mortar box was at the extreme western end, do I understand you?

A. Yes, sir.

Q. Of the obstruction?

A. Yes, sir.

Q. It appeared to have been thrown on the sand and slid down?

65 A. Yes, sir.

Q. And the sand was to the east of the mortar box?

A. That was the appearance it had. It rested partly on this pile of stuff.

Q. What else was there?

A. O, there was stone and brick and stuff there.

Q. Did you examine it carefully as to what there was there?

A. Not very. I could see it was a pile of building material.

Q. Do you remember whether or not there was any lumber or not of any kind there?

A. Well, I don't recollect. It was mixed up—most everything.

Q. How far from the mortar box did the obstruction extend toward the east?

A. To the curb-stone, I took it.

Q. Do you know whether there was any space between the end of the mortar box and east curb where a vehicle could pass?

A. I don't recollect that.

Q. What was the condition as to lights?

Objected to; objection sustained; plaintiff excepts.

Q. State, if you please, how you were able to make those measurements.

A. Why, we had a tape line.

Q. Could you see the figures upon the tape line?

A. I think we took a lantern or sent for a lantern when we took the measurements. That is my recollection of it.

Q. I will ask you if there was any other way of seeing what the measurements were on the tape line?

A. I don't recollect as to there being any lights around there that we could see by.

Q. I will ask you if you recollect taking the tape line over to the lamp-post to see?

A. I don't recollect that.

Q. You say you don't recollect that you sent for a lantern?

Objected to.

A. I think we either sent for one or else took it with us. I
66 think we had one at the time we were taking the measurements. That is my recollection of it.

Q. What means had you to ascertain or see the measurements on the tape line?

A. Well, my recollection of it is we had nothing but a lantern; I could not say.

Q. What lantern do you refer to? Where did you get it?

A. I think we either sent for it or took it down. I don't recollect where the lantern came from. It is my recollection we had a lantern. I don't know who got it or where it was got.

Q. Did you find any lantern there when you went there?

Objected to.

Q. Outside of the lantern which you took there, that you have spoken of, was there any light there by which you could see to make the measurements?

Objected to.

(By the COURT:)

Q. How did you find out what the measurement was?

A. That is my recollection of it—that we had a lantern that we took measurements by.

(By Mr. WILCOX:)

Q. Where did you get the lantern?

A. I could not say.

Cross-examination by Mr. SHERWOOD:

Q. You were employed at the Kennard House at that time?
A. No, sir.
Q. Where were you employed at the time?
A. I don't think I was employed anywhere just then.
Q. Where were you living at the time?
A. I was rooming at the Arlington block at that time.
Q. And you were out of employment at that time, is your recollection?
A. Yes, sir.
Q. Where did you first meet these gentlemen who went with you to make the measurement?
A. Met them at the Ocean.
Q. Oyster Ocean?
A. Yes, sir.
67 Q. What time did you meet them at the Oyster Ocean?
A. In the neighborhood of 12 o'clock; midnight sometime. I don't know just the time.
Q. How long were you there before you went out to make the measurements?
A. I just met them there just before we went down. It was but a few minutes from the time we met them before we went down to take the measurements.
Q. Did you say you held the tape measure?
A. Yes, sir; a part of the time.
Q. Did you measure it more than once that night?
A. Yes, sir, measured it several times.
Q. How did your measurements agree?
A. All right—that is, the measurements we took. We measured until we got the correct thing, I know. We was very particular.
Q. You measured several times in order to get right?
A. Yes, sir.
Q. How many times?
A. Two or three times—three or four times. I don't know.
Q. Did you hold the measure each time?
A. I think not.
Q. How long were you there?
A. I don't know; probably fifteen or twenty minutes.
Q. And measuring all the time?
A. Oh, no. I don't know as we were measuring all the time.
Q. What were you doing?
A. Was not measuring any longer than it took to measure it, of course. We were talking—I don't know just what we were doing besides measuring. I can't tell you just what we done besides that. I know we measured three or four times.
Q. Did you compare your measurements with those that had been previously taken?
A. I don't recollect whether we did or not.
Q. You knew there were measurements taken before that night by these same gentlemen?

A. That I don't recollect.

68 Q. Do you remember anything being said about those measurements?

A. No, sir.

Q. Do you remember the kind of obstructions that were in the street?

A. It was building material—sand and rubbish of different kinds.

Q. This box that was on the outside, what kind of a box was that?

A. That was a large mortar box.

Q. Describe it to the jury as near as you can.

A. Oh, I should think it was a box probably 8 or 10 feet long and five or six feet wide and a foot or so high, probably; maybe a little more than that; didn't measure it. I should judge that was about the description of it, as near as I can recollect.

Q. Was there more than one box in the street there?

A. I don't recollect any more than that one.

Q. Did you see where the buggy struck the box?

A. Well, they said it struck the corner of the box.

Q. Did you notice?

A. No, I did not.

Q. You paid no special attention to anything except the measurements, did you?

A. No, sir.

Q. You just measured the distance from the box to the west curb?

A. No, we measured each way.

Q. Then where did you go?

A. We went back to the Ocean.

Q. Did you sign the card?

A. Yes, sir.

Q. At the Ocean—Ocean bar?

A. Yes, sir; that was about the only place that was open at that time.

Q. How far was that box from the lamp-post?

A. I could not say.

Q. Did you notice the lamp-post there?

A. I don't know that I did. I was not looking for lamp-posts.

Q. What is your business now?

A. I have charge of the billiard room at the Kennard House.

69 *Testimony of Frank F. Day.*

FRANK F. DAY, called on behalf of the plaintiff, being sworn, testified as follows:

(By Mr. BACON:)

Q. Where do you reside?

A. 138 Murison street.

Q. Where did you live in 1879?

A. 26 Bolivar.

Q. Do you remember the occasion of the accident to Henry King on the 12th of November, 1879?

A. Yes, sir.

Q. I will ask you if you had occasion to go down and examine or not the place of the accident?

A. Yes, sir.

Q. At whose request did you go?

A. At Mr. Thomas Elwood's.

Q. At what time in the day or evening did you go?

A. Between eight and nine o'clock.

Q. Who went with you, if any person?

A. Mr. Oswald, Mr. Thomas Elwood, and John Elwood.

Q. What condition did you find things in down there on Bank St.?

A. Found the street obstructed; probably about two-thirds of the street, very near, obstructed.

Q. By what was it obstructed?

A. Stone, dirt, and mortar box.

Q. Did you make any measurements?

A. Paced it of- myself.

Q. Were there any measurements made any other way?

A. Yes, sir; Mr. Elwood marked it off with either a stick or tape, I don't remember which.

Q. You didn't take any part in that?

A. No, sir.

Q. Do you remember how they were able to get the distance on the tape line?

A. With the lamp light, I believe—that is, later on.

Objected to.

Q. Just at nine o'clock now?

A. I don't remember.

Q. I will ask you what was the furthest obstruction in the street?

A. The mortar box.

Q. Coming east from the mortar box, this way, how much of the street was obstructed?

A. Between 24 and 25 feet, somewhere around that neighborhood, I don't remember which.

70 Q. I want to ask you if those measurements were put down in any way—any memorandum made of them?

A. Yes, sir; put down on paper. I don't remember who put them down.

Q. Were they signed by the parties making them?

A. Yes, sir; I signed my name and the rest signed theirs.

Cross-examination by Mr. SHERWOOD:

Q. You know nothing, however, as to the extent of the obstruction except from your pacing it?

A. That is all, sir.

Q. You do not remember the number of paces of obstruction and the number of clear roadway, do you?

A. No, sir.

Q. And you are simply testifying now from your recollection of the appearance of it at that time?

A. What they said by the measurements they took, as near as I can remember.

Q. And you know nothing about it from your own knowledge, do you?

A. Well, as near as I can——

Q. Further than pacing?

A. In the pacing of it.

Q. Did you make an examination of the obstruction there?

A. I examined it as far as the mortar box and the obstruction there. I could see what there was there.

Q. What kind of a mortar box was it?

A. An ordinary mortar box. The same as they use—a wooden mortar box.

Q. Describe it—the dimensions of it.

A. I could not describe it.

Q. How high was it from the ground?

A. I could not tell you that.

Q. You don't know whether it was one foot or four?

A. No, sir; I know it was nearer one than it was four.

Q. Did you notice where it had been hit by the buggy?

A. I didn't pay any attention to it; didn't look where it had been hit. All I know is it was there.

71 Q. You did not notice whether it was moved or not by the buggy?

A. No, sir.

Q. How long were you there?

A. Well, I could not tell you that. I suppose in the neighborhood of fifteen minutes, examining.

Q. And these other gentlemen were measuring it with a stick or tape line?

A. Yes, sir.

Q. You don't know which?

A. I don't know who measured it.

Q. And did they put down at the time, on anything, a minute of the distances?

A. I think they did; yes, sir.

Q. Where were they when they made a minute of it?

A. Right there, I should think.

Q. That is your recollection?

A. That is my recollection; yes, sir.

Q. Where did you go then?

A. To the Oyster Ocean.

Q. Was it at the Oyster Ocean you met these gentlemen?

A. The Oyster Ocean was where I met them; yes, sir.

Q. All were there and started from there?

A. Yes, sir.

Q. And when you got through you went back there?

A. Went back to the Oyster Ocean again; yes, sir.

Q. And did you make any further measurements that night?

A. Well, we went back again later on.

Q. What was your object in going back?

A. Went back with some more men.
Q. Did you go with them?
A. Yes, sir.
Q. Did you make a remeasurement?
A. They made the remeasurement. I did not do anything to it.
Q. What was the reason for making the remeasurement? Were they not satisfied with the first?
A. That I could not tell you.
Q. You went with them, you say?
A. Yes, sir.
Q. Did you pace it again?
A. Not that I recollect; I don't remember; I suppose I did. I can't remember whether I did or not.
72 Q. You could not remember what you did that time?
A. Oh, yes; I remember what I did.
Q. What did you do?
A. I looked around there and saw them at work.
Q. Did you take any measurements?
A. I took no measurements.
Q. How long were they there making measurements the second time?
A. Well, I suppose about the same length of time they were at first.
Q. Did they measure it more than once?
A. Yes, sir; measured it three or four times.
Q. They wanted that thing down fine that second time?
A. I suppose they wanted to get it down as fine as they could get it.
Q. That was what time?
A. I could not tell you. I know it was later on.
Q. How much later?
A. Probably as late as eleven o'clock or later than that.
Q. When you got through there where did you go?
A. Back to the Oyster Ocean.

Testimony of P. W. Holcomb.

P. W. HOLCOMB, called on behalf of the plaintiff, being sworn, testified as follows:

(By Mr. BACON:)

Q. Do you remember the night of November 12th, 1879, that Mr. King was injured on Bank street?
A. Yes, sir.
Q. Did you have occasion to go down Bank street to see an obstruction where the accident happened?
A. Yes, sir.
Q. How did you come to go there?
A. I was asked to go by Mr. Elwood—invited.
Q. Which Mr. Elwood?
A. Thomas.
Q. What is your business?

A. Well, I am in the real estate business and lumber business.
Q. What was your business in 1879?
A. I was handling more or less lumber, timber, at that time.
Q. You were requested to go down there by Mr. Elwood?
A. Yes, sir.
Q. What time in the evening was that?
73 A. About 12 o'clock.
Q. What was the nature and character of the obstruction as you found it when you got there?
A. Oh, we found stone, brick, sand, an old box—an old lime box—mortar box.
Q. How much of the street did the obstruction occupy?
A. There was about ten foot more of street that was blocked than there was that was clear; there was about 35 or 36 feet blocked and there was about twenty-four or twenty-five feet that was clear.
Q. How do you know that?
A. I done the measuring.
Q. You measured that?
A. I measured that myself. I could not tell you now within a few inches, but it won't vary a foot or a half a foot from my statement.
Q. What was the character and nature of the obstruction there? Describe it as well as you can.
A. Well, it was stone and brick piled, and sand lay in the middle of the street—a great big pile of sand and rubbish and stuff there—and then this old box had been thrown there on that pile of rubbish and slid down to nearly the bottom of the sand pit.
Q. Did you know that other people had measured that that night?
A. At that time?
Q. Yes.
A. No, sir; I did not until after we had measured it.
Q. Now, what was the nature of the obstructions, the outside edge of it, towards the west side of Bank street?
A. Well, on the facing west was where this old box lay, the lime box that had been thrown over this pile of rubbish and slid down there to the driveway.
Q. How were the measurements made as to the obstructions and as to the amount that was clear—what was done?
A. Why, measured it with a tape line.
Q. Who assisted you in making the measurement?
A. Mr. Wenbau.
74 Q. Now, when you got the measurements completed, how did you see on the tape line how far it was?
A. We had a lantern.
Q. Where did you get the lantern from?
A. Got it over to the——

(Mr. SHERWOOD:) If you know.
(WITNESS:) I don't know where it came from.

Q. Where did you first see it?
A. Why one of the parties with us—I can't recollect who——

Q. Where did you first see it?
A. At the Oyster Ocean.
Q. Was that before you went down?
A. Yes, sir.
Q. Did you take it down with you from the Oyster Ocean to the obstruction?
A. Yes, sir; some one took it down. I don't remember whether I took it.
Q. One of the party took it down with you?
Objected to.
A. Yes, sir; I won't be positive whether we took that down with us first, when we first went down, or whether it was so dark we could not see, and sent back for it. I won't swear positively as to that, but I know we had to have a lantern there to see to measure. I could almost swear positively I took it from the Ocean House.
Q. When you went there was there any other means of seeing the measurements on the tape line than by means of the lantern?
Objected to.
Q. What was the last you saw of that lantern after you saw those measurements by it?
A. The last was when I took it home.

Cross-examination by Mr. SHERWOOD:

Q. Where were you at the time you were requested to go down and make this measurement?
A. I think I met Mr. Elwood either at Schellentrager's or at the Oyster Ocean. If I met him at Schellentrager's we went across to the Ocean.
Q. What business does Schellentrager carry on there?
75 A. He has a pool-room and a saloon—bar-room.
Q. What time was it when you first met him?
A. It was between eleven and twelve o'clock.
Q. How long had you been at Schellentrager's or the Oyster Ocean when you met him?
A. I just dropped in there and happened to meet Mr. Elwood. I would not be positive whether it was there or over at the Oyster Ocean that I met him first.
Q. Who else was there when you met Elwood?
A. His brother and three or four others.
Q. What did you do before going down there to take the measurements?
A. Why I—Oh, I don't know as we done anything.
Q. Did you take a drink?
A. Might possibly.
Q. And you all went down there to measure?
A. Yes, sir.
Q. How long were you there measuring?
A. Well, we were probably there ten or fifteen minutes; might have been there longer.

Q. How many times did you measure?

A. Well, we ran over that three or four times—two or three times. I think I measured and I think Mr. Wenbau took the tape and took care of it—saw it was correct. I had hold of the finger end when I first measured; I ain't sure but I did twice, I think, and let him measure it to see whether I was correct or not. I know I was very anxious to have it measured correct. I had my own tape line, one that never failed me yet.

Q. You carry a tape line with you?

A. I do not now; I used to them days.

Q. You noticed the figures on that tape line by the light of a lantern?

A. Yes, sir.

Q. You don't know whether the lantern was there or whether you sent for it?

76 A. It was there when we measured it, and I am pretty positive that we took it right along with us; if we did not it was sent for and brought there.

Q. Are you positive with reference to either?

A. Yes, sir; I am; but I am almost positive we took it right along with us.

Q. Now, did you not take that line up under the light of the lamp at the lamp-post there to see the figures?

A. No, sir.

Q. You are certain about that?

A. I don't remember seeing any light there at all.

Q. Do you know whether there was a gas post there or not?

A. No, sir.

Q. It was on the corner of Johnson street and Bank?

A. That is away this side of Johnson street where this was.

Q. How far this side of Johnson street?

A. It is quite a pace.

Q. How far is quite a pace?

A. It is quite a distance; I could not tell you.

Q. A hundred feet?

A. I could not tell you just how far, but it is this side of that.

Q. Just estimate it?

A. Well, now, I am not familiar enough with that there to estimate it, whether it is fifty feet long or forty, and Johnson St. is below where this was.

Q. That is to say, it was north of where this was?

A. Yes, sir.

Q. How far north?

A. I can't tell you how far.

Q. Did you see any gas post there at all, around?

A. I don't remember seeing any light at all.

Q. And you are certain you had a lantern there?

A. Yes, sir; I am very positive.

Q. And you will swear you either took it with you or sent for it?

A. Yes, sir.

Q. Whom did you send?

77 A. If I remember right, Mr. Elwood's brother produced the lantern—John Elwood or Mr. Elwood's son, one of them.

Q. But the first you saw of the lantern was when it was there and you were looking at the tape measure, is it not?

A. I know we had this lantern—yes, sir—to measure this. As I say, I would almost swear positively that we got the lantern before we left the Ocean to go down there. Possibly we had to send for one; possibly we had to send for a lantern.

Q. Do you remember distinctly sending for it?

A. But I know the lantern was produced to me to see to measure this.

Q. All you know, then, positively is that you had a lantern to see those figures by—that is all you are willing to swear to positively, is it not.

A. Yes, sir; I swear positively we had the lantern.

Q. And that is the only thing you can swear positively about, is it not, so far as that lantern is concerned?

A. I can swear to the pile of rubbish there and measuring.

Q. As far as the lantern is concerned, the only thing you can swear positively about is that you had a lantern there to see the figures by?

A. What more do you want? What else can I? We had the lantern there. I had to have a light there to measure that the same as to measure anything else. We had a lantern there to measure this——

Q. Where did you go after you got through?

A. Went home.

Q. Did you go directly home from making the measurements?

A. I don't recollect whether I went directly home or not.

Q. Did you sign a card with figures on?

A. Yes, sir.

Q. Where were you when you signed the card?

A. In the Ocean.

Q. Then you went back to the Ocean?

A. Yes, sir; went back to the Ocean. I don't recollect how
78 long I stopped or anything after I signed the card at the bar at the Oyster Ocean.

Q. Now, can you describe the lime box that was out the furthest in the street?

A. I can describe it pretty well.

Q. Now, will you describe it to the jury?

A. What do you mean, the size of it—clear of it?

Q. The size of it?

A. It is a box about four or five feet wide and, I should think, about eight or ten feet long.

Q. How high?

A. A foot or 15 inches; I should judge about that high.

Q. And you examined the rest of the material that was in the street?

A. Why, no more than it was rubbish—brick, stone, sand, and pieces of boards there.

Q. Were there any boxes in the street?

A. No, sir; not where this lime box was.

Q. Was there any other box in this obstruction?

A. There was old rubbish there and lumber that lay piled up on the other stuff there—old rubbish.

Q. That is not the question. Answer my question. Did you see any other box besides the lime box there in the street, in front of this property?

A. I don't remember that I did.

Q. Where was this stone and brick and material, with reference to the box?

A. Well, it was thrown up there in a heap—lime and sand and brick and everything—the same as you see in any other place; the same as you see it hundreds of times in the streets where they are building.

Q. Any difference at all from other streets where they are using them?

79 A. Well, that kind of rubbish where they are building brick buildings. You know as well as I do what kind of rubbish they throw out.

Q. Did you examine to see where the buggy struck the box?

A. I think I noticed it.

Q. Did you notice whether it moved the box or not?

A. I don't remember that. This box was thrown over that pile and shoved down onto the sand.

(By the COURT:)

Q. Describe to the jury how that was—whether it was fast or just lying on top of the sand.

A. It was not fast.

(By Mr. SHERWOOD:)

Q. Was there anything in the box?

A. An empty lime box. It was thrown down, and the narrow end of the box lay the lowest, and one corner of that slipped down diagonally into the street.

(By the COURT:)

Q. The bottom up or below?

A. The empty part of the box—the open part—was up.

(By Mr. SHERWOOD:)

Q. What corner of the box was struck by the buggy?

A. I think that the buggy struck on the side—the corner.

Q. Indicate by the points of the compass. What corner would that be—southwest?

A. That would be the southwest corner.

Q. Did you notice whether it moved the box any or not?

A. I don't remember much about that. I know it was chucked down there.

Q. Have you talked with any one about the case since the last trial?

A. No, sir.

Testimony of Peter Carroll.

PETER CARROLL, called on behalf of the plaintiff, being sworn, testified as follows:

(By Mr. BACON:)

Q. Where do you live?

A. St. Clair street.

Q. Where did you live in 1879?

A. I think with Tom Elwood.

Q. What was your business then?

A. I had charge of the stable.

80 Q. What is your business now?

A. I am of the firm of Greenbrier and Carroll.

Q. Do you remember an accident that happened to Mr. King in November, 1879?

A. Yes, sir.

Q. What, if anything, do you know about a lantern being sent for that night by Mr. Elwood?

A. Well, a couple of fellows came in there for a lantern.

(By Mr. SHERWOOD:)

Q. Do you know whether it was sent for by Mr. Elwood or not?

A. I suppose it was. I could not swear it was sent for by Elwood. I know a party came and asked for a lantern.

Q. Who came and asked for it?

A. I think it was Elwood's brother—John Elwood.

(By Mr. WILCOX:)

Q. What, if anything, did Mr. Elwood say he wanted to do with the lantern?

Objected to.

Q. What did he do with it?

A. I don't know as he got a lantern.

Q. You don't know that he got a lantern at all?

A. He came and asked me for a lantern, and I told him there was no lantern in the stable; "You can go right over to the fire."

Objected to.

Deposition of John J. Elwood was here read in evidence, on behalf of the plaintiff, to the jury.

Question No. 12 in said deposition objected to and objection sustained; to which ruling the plaintiff excepted.

The same objection on question Nos. 13 and 14 of said deposition.

The said deposition is hereto attached, marked "Exhibit A," and made part hereof.

"EXHIBIT A."

1st Q. State your name, age, occupation, and place of residence.

A. My name is John J. Elwood; I am thirty-three years
81 of age; I am a plumber by occupation, and I reside in the city and county of New York.

2nd Q. State where you resided in the fall of 1879.

A. I resided at Cleveland, Ohio.

3rd Q. Do you remember the occasion of the accident to Mr. Henry King, on Bank street, in said city of Cleveland, on the 12th day of November, 1879?

A. I do.

4th Q. State how you learned of the accident.

A. I learned of it from my brother Thomas.

5th Q. Did you make an examination of the place of the accident on that night?

A. I went to the place of the accident at the request of my brother, and looked over the ground and made an examination at the place of the accident, which was near the intersection of Johnson street with Bank street?

6th Q. In what condition did you find the street at the place of the accident?

A. There was building material of various kinds and a mortar box or lime box obstructing a large portion of the street, extending out into the street from the east side toward the west. The mortar box was, I should say, at least seven feet square and fifteen or eighteen inches high or deep, and there was a pile of sand outside, beyond the middle of the street, from the mortar box a foot and a half or more.

7th Q. What, if anything, did you do with a line to ascertain the extent of these obstructions?

A. I measured the obstructions with a tape line. I found that from the east end to the end or outside of these obstructions was thirty-three feet, and from the obstructions to the west side up the street was twenty-six feet.

8th Q. Please state how much of the roadway was clear for the passage of vehicles.

82 A. About twenty-four and a half feet.

9th Q. Please explain what the twenty-six-feet measurement was.

A. It was from the mortar box to the inside of the west curb, and, as I said before, there was a foot and a half or so of sand alongside the mortar box, on the west side of it

10th Q. About what time of day was it when you made the above measurements?

A. It was about midnight.

11th Q. What was the weather on that day?

A. I don't recollect what the weather was on that day. It was very dark when I made the measurements and not raining, I think.

12th Q. State what, if any, lights there were about this obstruction.

A. There was a gas lamp on corner of Johnson street and one on east side of the street, Bank street, about a hundred and fifty feet away.

13th Q. What, if any, lights were there besides the street lamps in the street?

A. There were none.

14th Q. Were there any signal lights marking these obstructions?

A. Not any.

15th Q. Please explain how you were able to make your measurements.

A. I laid off the measure with the tape line and kept my finger on the place and carried the line to the lamp-post and looked at the figures. I did this every time, and I made each measurement over again; I made each measure twice.

16th Q. What, if anything, did you do to preserve these measurements?

A. I put them down on a card. I went up to my brother's stable and copied the measurements onto another card with pen and ink. The first was done in pencil. I did this immediately.

17th Q. State what you did with the last card, the one marked in ink?

A. I have it in my hand.

18th Q. At what distance could these obstructions be seen that night?

83 A. A person in a buggy could not see them more than ten feet away, and all of the light from the lamp-post or buildings was not sufficient to enable one to see them before he got almost upon them. I looked at them on purpose to see how that was. I walked away from them and looked at them to see how far I could see them.

JOHN J. ELLWOOD.

Subscribed and sworn to in my presence.

[SEAL.] JAMES H. ELLIOT,
Notary Public.

Testimony of Henry King.

HENRY KING, called in his own behalf, being sworn, testified as follows:

(By Mr. WILCOX:)

Q. You are the plaintiff in this case?
A. I am.
Q. Where did you reside in 1879?
A. In Pittsburgh.
Q. What was your business?
A. Manufacturing iron.
Q. Where were you on the 12th day of November, 1879?
A. I was in this city.
Q. Where were you stopping?
A. Kennard House.
Q. Did you see Mr. Elwood on that day?

A. I did.
Q. Where did you see him first?
A. At his office.
Q. Where was his office?
A. At his stable.
Q. On St. Clair street?
A. Yes, sir.
Q. When did you next see him after seeing him at his office?
A. In the evening of the same day.
Q. Where was that?
A. At the St. Clair St. front of the Kennard House. He had driven up there in a buggy, saying to me—he had sent in word to that effect—that he wanted me to come out. I came out in a few moments after I received the word.
Q. What took place after you came out of the Kennard House and met Mr Elwood?
A. We had perhaps a minute's talk there, and he asked me to get into the buggy with him; that he wanted me to see that team.
84 I got into the buggy and we started towards the depot, driving from the front of the hotel out to the corner.
Q. What did you do then?
A. Drove a short distance down Bank street, and it was very dark. After we had gone perhaps a hundred feet from the corner of St. Clair down Bank, to the north, I heard a noise of the horses' feet coming in contact with something, and they sheered over towards the westerly side of the street.
Q. What was the nature of it?
A. It sounded like a paper box, like the crushing of a paper box or some such material. I could hear they struck something, and we went diagonally across towards the other side of the street.
Q. Which side was that—the west side?
A. The west side. We were perhaps ten or twelve feet from the curb. We were on the east side at the time. I heard the horses stepping on something, and we went on quite an obtuse angle across the street. In making the westerly distance of ten feet we drove perhaps a hundred feet in a northerly course, and that brought us to the west of the middle of the street, as near as I could tell; then straightened for the depot.
Q. What was your first notice of the obstruction.
A. I felt the buggy going over.
Q. Tell the jury what happened then.
A. The buggy seemed to careen over to the side I was on. I was sitting on the left-hand side of the buggy, and Elwood was on the right-hand side driving, and I felt the wheel, felt the buggy make a quick move over in that direction, and struck something, not hard enough to make a noise like that (indicating) or louder, of course; seemed to strike something, some wooden material that
85 gave a sound, at all events. The whole time did not occupy a space half as long as it has taken me to tell it.
Q. After hitting the obstruction?

A. After feeling the buggy going over to the time I was landed in the street.

Q. What became of you?

A. I was in the street, with a broken leg.

Q. Now, you may tell all about that.

A. Of course, I was not aware my leg was broken in the beginning, right in the street. I landed on my feet. I aimed to do that. I did not want to land on my head. I did not know what I was going to hit. A person can think under those circumstances a good deal faster than he can tell it. I was always afraid of being thrown on my head; always tried to land on my feet; but in this instance my knee was drawn down and came in contact with the street—pebbles or whatever it consisted of—and I immediately tried to get up, and did manage to get up on one foot. I was afraid to stay there. I knew it was about the time in the evening that a good many carriages would be passing back and forth, going to and from the evening trains, and it was a dark place. I was afraid to stay. I didn't know who might come along and run over me and make a bad matter worse. I tried to walk and I found that I could not, and I got down onto my hands and knees and crawled off to the west side of the street and sat down on the curb-stone.

Q. How far was it from where you were thrown out to where you finally landed on the curb-stone?

A. Well, from eight to ten feet, probably; not to exceed ten feet, I don't think.

Q. Where was Mr. Elwood during this time?

A. He was busy with his horses. He held onto his horses. They did not get away from him. I don't think, from the noise,
86 that they made any particular effort to get away from him. He said, "Whoa, whoa."

Q. Where were the horses with reference to the place where you tipped out?

A. The horses were north of us.

Q. How far had they gone, if at all?

A. I don't think the horses went 25 feet from the place where the buggy upset. I think Elwood had them stopped.

Q. Was anybody there besides Elwood and yourself?

A. Not at the time, except a man that Elwood hailed, he called Mat. I don't know who Mat. was. He appeared to be there. This Mat., I think, had spoken before that; I could hear voices. It was so dark I could not see.

Q. What became of the horses, if you know?

A. I suppose he left them and went somewhere.

Q. After you had crawled to the sidewalk and were stopping there could you see this obstruction in the street?

A. No, I don't think I could. I would not have known there was anything there from what I could see. I knew there was something there that upset the buggy.

Q. How long did you remain on the sidewalk before you were taken away from there?

A. Perhaps four or five minutes.

Q. How were you taken away?

A. In a carriage belonging to the Cleveland Omnibus Line Transfer Company.

Q. What was said between you and Elwood when he came back and found you lying on the sidewalk?

Objected to; objection sustained; exception by plaintiff.

Q. At the time you were tipped over there by that obstruction what do you say as to whether or not there were any lights there?

Objected to.

A. No light to see there was any obstruction there; none at all.

Q. Was your attention called to the fact whether or not there was a light there?

87 A. Indeed it was. It was the subject of remark, and right after that, too. There was a little profanity mixed with it, too.

Q. If there had been a light upon that obstruction, would you have seen it?

A. I certainly should.

Q. With reference to the obstruction, you may state what lights, if any, there were anywhere near it.

A. The lamp-post that I saw lighted, the first one, was at the corner of Bank and St. Clair, near the drug store.

Q. How far was that from the obstruction?

A. Well, the whole distance from the obstruction up to the corner, I suppose, was in the neighborhood of 350 feet, probably. That is the first light I noticed. I noticed there was quite a bright light at the drug store. I guess the drug store had charge of that. I don't think the city was running that. There was another light opposite, on the west side of Bank street, about half way between where we got upset and St. Clair street.

Q. What other light?

A. None, except there appeared to be some little houses set back from the street, and there were lights in the windows or in the houses, but nothing that afforded any light out upon the street; nothing that contributed at all towards lighting the thoroughfare.

Q. Did you notice any other lights further down towards the depot than the place where the obstruction was—passed the obstruction?

A. No, I did not notice particularly anything beyond that.

Q. How far would you say it was from the obstruction where you tipped over to the nearest lamp-post that was lighted—to the nearest light of any kind?

A. Why, there was a light on the west side of the street. I can't recollect just whether it was a lamp-post or a saloon light hung out, extending over the walk.

88 Q. Now, how far was it from the obstruction to the light?

A. Well, that light, as near I can remember, was about half way between the obstruction and St. Clair street. I think the entire distance from the obstruction up to St. Clair street is about

350 or 360 feet, and if that was the case it would make the light in the neighborhood of 175 to 180 feet northwest of the obstruction.

Q. How much did that lamp illuminate the obstruction which tipped you over?

A. Nothing at all. It would not reach that distance.

Q. Now, from where you were driving along on Bank street towards the depot, how far could you see that obstruction before you reached it?

A. I did not see it at all until after the accident; I felt it, though. I did not see it until we were tipped over; did not see the obstruction nor anything to indicate that there was an obstruction there.

Q. At the curb-stone, before you were taken away in the carriage, could you see the mortar box that tipped you over?

A. I imagined I could see it.

Q. How fast were the horses being driven from the time you left the Kennard House until you struck the mortar box?

A. A very slow jog. I do not suppose that it would exceed—it is pretty hard to tell that—anywhere from four to six miles an hour.

Q. Could you tell, from anything that you noted, the height of the obstruction that tipped you over?

A. No, nothing more than the appearance as I thought I could see it after I was sitting on the curb. It seemed to be a pretty large box of some description.

Q. What kind of a night was it?

A. It was about a usual November night. It had been raining, and between five and six o'clock, I think, the rain had fallen quite heavily.

89 Q. Was it raining at the time of the accident?

A. No; I don't think it was what one might term raining, but there appeared to be a mist. It was not hard enough to call a rain. It was misty and damp at the time we started away from the hotel.

Q. After the wheels of the carriage had struck the obstruction was there time enough to stop the horses before you tipped over?

A. No, sir.

Q. What portion of the street was occupied by the obstruction?

A. There must have been a considerable more than half.

Q. What do you say as to the distance between the end of the obstruction that tipped you over and the west side of the street, where you crawled to—where it was clear?

A. As I was sitting there waiting for the carriage or some sort of conveyance to get away I thought of that matter, and I was very well satisfied indeed there was over half of the street occupied, a considerable over half. It appeared to me that obstruction could not be over 22 to 24 feet from where I was sitting on the curb. I don't think it was more than that. I don't think I could distinguish anything at all beyond, and I am not entirely certain I did distinguish it at all.

Q. Do you know what is the width of Bank street?

A. I think it is very close to sixty feet between the curbs. I

measured it on one occasion, and it was two inches short of sixty feet between the curbs.

Q. After you got to the edge of the sidewalk what happened? What was done with you?

A. After I got to the sidewalk Mr. Elwood came to me. He seemed to comprehend the situation very quickly and he said——

Objected to.

Q. What did Mr. Elwood do in relation to getting you back to the Kennard House?

90 A. Mr. Elwood walked up the street some distance; saw a carriage coming. I saw the carriage; saw the lights of it. One of the omnibus line's carriages it proved to be. Mr. Elwood went up the street some distance; I say up—that is south——

Q. Towards the Kennard House?

A. Kennard House and stopped the carriage, and there was some conversation between him and the driver. The driver didn't want to come down.

Q. You need not give what the conversation was.

A. He turned that carriage around.

Q. How did you get into the carriage?

A. With the assistance of Mr. Elwood and the driver.

Q. What was done with you then?

A. I was taken to the Kennard House.

Q. How did the carriage get to you down on the sidewalk?

Objected to.

A. The carriage made a turn to the east and came around and backed down to where I was sitting. The carriage made a turn down on the side of the street, and came close to this pile of material and backed into this place on the curb?

Q. What kind of a carriage was it?

A. One of the Omnibus Company's line, a regular closed carriage—a closed-top carriage, a large two-horse hack, an outside seat for the driver.

Q. After you was taken to the Kennard House what was done?

A. Surgeons were sent for immediately.

Q. What physicians were called?

A. Dr. Sterling and Dr. Thayer.

Q. How long did you remain at the Kennard House under the care of physicians?

A. Thirty days.

Q. Where did you go from there?

A. To my home in Pennsylvania—Pittsburgh.

Q. What was your condition at the Kennard House imme-

91 diately after the accident and what was done for your relief?

A. When I got there I was undressed pretty promptly or partially so, and my leg was very much inflamed and swollen very badly, and a colored man who had been at the Kennard House for a great many years and one that is considered a pretty good nurse—proved himself so in my case—took the case in hand, as you may

say, until such time as the doctors came, and he began to put cold applications on at once, and when Dr. Sterling came he praised the fellow very highly. He says, "John, you have done quite right," and that treatment was really about all the treatment that I had for some twelve or fourteen days following.

Q. What was done for you in regard to apparatus or things of that kind?

A. They had a bed specially made for me and other appliances, so that I could reach up and rest myself in the bed with my arms and hands.

Q. What was your condition as to being able to help yourself?

A. I was not able to help myself. You mean after going back to the hotel?

Q. Yes.

A. Oh, I was not able to help myself.

Q. For how long did that last?

A. Well, I was not able to get over to my office after getting back to Pittsburgh——

Q. No; at the Kennard House.

A. Oh, I did not get so I could help myself, except to be helped up to get onto crutches; I could then go a short distance, I guess.

Q. When did you leave the Kennard House and where did you go to?

A. I left the Kennard House, I think it was the morning of the 12th of December; I am pretty certain it was the 12th. I know the bill I paid was for a month's board.

Q. Where did you go to from there?

A. I went to my home, in Pittsburgh.

Q. How were you taken?

92 A. In Mr. McCullough's private car, a car with a very comfortable bed in it.

Q. How were you taken to the depot?

A. In a carriage.

Q. Did you have to have any assistance?

A. Oh, yes; from the carriage I had to be carried on a stretcher into the car.

Q. How were you taken out of the car when you reached Pittsburgh?

A. The same way. A stretcher was brought in and some of my employees were on hand to take me to my home.

Q. How long were you confined to the house in Pittsburgh?

A. Some six months before I got over to my office.

Q. Did you have any medical attendance in Pittsburgh?

A. Constantly.

Q. Who was the physician?

A. Dr. Willard, of Allegheny City.

Q. How long were you under his treatment?

A. I have been under his treatment nearly ever since then.

Q. On account of this injury?

A. On account of this injury. I never had any other ailment.

Q. What physicians attended you in Cleveland?

A. Dr. Elisha Sterling and Dr. Proctor Thayer.

Q. You may tell the jury what was the character of your injury as the result of this accident.

A. Well, the knee joint was pretty badly used up. The large bone is broken across here (indicating) in an angular shape, this way. The side bone is broken some two inches where it joins the knee, and this piece (indicating) is split—horizontally broke or nearly horizontally broke up in the knee joint, making three distinct breaks. The case was so reported by Dr. Sterling to my doctors in Pittsburgh.

Q. Is there any way you can show the condition of your leg at present?

A. I think I could. (Witness exhibits to the jury his injured leg.)

93 Q. Now you may explain the nature of the injury.

A. This main bone (indicating) was broken right across in this shape in about this place (indicating). This side bone was broken in here (indicating), and the split in this larger break here when [went] into the knee-joint, and it is not much of a knee yet for action.

Q. Did the bones protrude any?

A. No; this is the result of it (calling attention — purple color of skin). The circulation is impeded and there is a constant tendency to ulceration. I wear supports continually. I left them off this morning, thinking it might be important to make an exhibit of it.

Q. What has been the condition of your leg from the time of the accident until now?

A. It has required constant attention. It is the first thing to be attended to in the morning and the last thing at night.

Q. In what way have you to attend to it in the morning and at night?

A. By bathing and adjusting the supports and taking them off at night.

Q. What sort of supports do you wear?

A. Elastic bandages—rubber bandages.

Q. For what purpose?

A. For the purpose of preventing a breaking out and ulcerating of the leg, and that comes from an impeded circulation, so Dr. Sterling told me. The Dr. says also that it has impeded the circulation at the knee-joint.

Q. Without using these supports, how long could you use your leg?

A. Oh, but a very short time, not two days. I do not think—I would be laid up in two days' time.

Q. How long after you left Cleveland and went back to Pittsburgh was it before you were able to use your left leg at all?

94 A. I did not have my foot to the ground, I am certain, for over a year after the accident.

Q. Did you have to have any appliances other than bandages at the end of the year?

A. Well, I had to use crutches to walk with, and from that a cane.

Q. When were you able to give up the use of crutches?

A. I think it was about eighteen months before I got through with the crutches altogether. I first used two crutches and then one crutch and a cane, and I think, at the expiration of about eighteen months I was able to do without the crutch, but used the cane for several years afterwards, and at times do now.

Q. As the result of this accident what has been the effect upon the action of your knee-joint of the left leg?

A. Not a very good joint—pretty stiff.

Q. As compared with the other leg, how much use do you have of it?

A. A little over half as much as before the accident; not over half, I do not think.

Q. Have you had any other physician besides Dr. Thayer, Dr. Sterling, and Dr. Willard?

A. No, not in this vicinity. I advised with quite an eminent surgeon in the South at one time—at the Hot Springs, Arkansas.

Q. Now, at the time of your being treated here at the Kennard House, what was the character of the injury in regard to the inflam--ation?

A. Well, the inflam-ation was very severe—very great. My leg was swollen to over twice its normal size, and it required nearly two weeks to get that inflam-ation reduced, and that was done by way of application of ice—constant applications of ice.

95 Q. How long were those applications kept up?

A. About two weeks. I could not bear to have them left off for five minutes.

Q. When, with reference to the time of the accident, was any attempt made by the physicians to set the bones of the leg?

A. Well, I may say, no attempt was made until after the inflam--ation was reduced.

Q. How long after the accident was that?

A. About two weeks, as near as I can remember.

Q. Was that inflam-ation below the knee or in the knee-joint?

A. Both above and below.

Q. What was the effect upon the fluids in the knee-joint?

A. I do not know that I am enough of a surgeon or physician to give an intelligent explanation of that.

Q. How about the pain that you suffered?

A. Oh, the pain was very acute a great deal of the time—very acute.

Q. How long did that last?

A. As long as the inflam-ation did.

Q. What has it been since?

A. It has been a source of more or less pain ever since then.

Q. How much use do you have of your limb now?

A. Well, I suppose before that accident happened there were very few people that were more active.

Q. How has it affected your capacity for going around, and so on?

A. Do you want it in percentage?

Q. Any way you can give it.

A. Well, I am not able to do as much walking. There has been a reduction of seventy-five per cent. in the capacity of walking and getting around on my feet. I think that is a very moderate estimate.

Q. How does your ability to attend to business compare with what it was before you were hurt?

A. To attend to some parts of my business, I may say, I am almost entirely incapacitated to do it.

96 Q. What business were you engaged in at the time the accident happened?

A. In the manufacturing of pig-iron—

Q. What particular business?

A. I had the general overcharge—oversight of the whole business of three blast furnaces, a very large rolling mill.

Q. What were the names of the places?

A. The Grafton furnace, the Rebecca furnace, and the Kittanning rolling mill.

Q. What was your connection with those rolling mills and furnace?

A. I was looked upon as the person who was responsible for the conduct of the whole business.

Q. Were you required to give that business your personal attention?

A. I was.

Q. Were you interested in any other enterprise at that time?

A. No; nothing that required active attention upon my part.

Q. Did you have financial interest in them?

A. I had in all of them.

Q. What was your position with the companies?

A. I suppose I might have been called the general manager of the whole business.

Q. How long have you been engaged in the iron business?

A. In one shape and another for about thirty-five years.

Q. What, if any, compensation did you receive as manager of these blast furnaces and this rolling mill during the time you were laid up with this injury?

A. I did, but immediately turned it over to others.

(By Mr. SHERWOOD:)

Q. He did not ask you anything about that.

(By Mr. WILCOX:)

Q. You did get compensation from the furnaces and the rolling mill?

A. I did and immediately paid it to others.

Q. By reason of this injury, what were you compelled to do with the compensation that you received?

Objected to.

Q. What did you do with your salary?

97 A. Paid it to others for attending to my business.

Q. Why did you pay it to others?

A. Because I was incapacitated from attending to my busines myself.

Q. What incapacitated you from paying attention to your business?

A. Being thrown out of a buggy on Bank street, in this city, and breaking my leg.

Q. You may tell the jury the amount of expense to you from all sources on account of this injury, confining it to the seven months from the injury.

A. For my hotel and doctor bill and nursing and attendance and all here I paid out about $700 before getting away from the city.

Q. What did you pay afterwards during the seven months, keeping within the seven months?

A. Well, for having my business transacted and all—you mean all my bills that would be regarded as expenses?

Q. Yes.

A. I paid out an amount in excess of what I drew for my supposed services—an excess of my salary. My expenses during the seven months were greater than my supposed salary.

Q. About how much?

A. Well, during this seven months I paid out, all told, over seven thousand dollars. I know what it was for the year exactly. The seven months I suppose to be a fair estimate—that the seven months were an average seven months.

Q. Are you able to tell whether or not it is a permanent injury?

A. So pronounced by——

Objected to.

Q. What do you know about it yourself?

A. I regard it as a permanent injury. I can see no way for a permanent recovery, and, consequently, it is a permanent injury.

Cross-examination by Mr. SHERWOOD:

Q. Where are you now living, Mr. King?

98 A. On a farm I have down here in Portage county, near the little village of Kent.

Q. How long have you been living there?

A. I think it was a year ago last summer that I went out there.

Q. Prior to that you lived in Pittsburgh?

A. Yes, sir; my place of business was in Pittsburgh, but my residence was in Allegheny City, just across the river.

Q. How long had you been in Cleveland at the time of the accident?

A. I came in on one of the earliest trains that morning—the morning of the accident. The morning of the 12th of November I came to the city.

Q. Here on business?

A. On business. I went nowhere except I had business.

Q. How did you reach the Kennard House?
A. I walked from the Nypano depot, as it is termed, to the Kennard House.
Q. You saw Mr. Elwood about noon of that day?
A. About noon of that day.
Q. Was that the business you were upon?
A. No, sir.
Q. What brought you here from Pittsburgh?
A. I think that might be regarded as taking first, second, third, and scaling along down that way; it would be about fifth or sixth, probably. That was of minor importance.
Q. Yet you got at that substantially the first thing?
A. No, sir.
Q. What time in the morning did you get here?
A. I think it was about eight o'clock.
Q. And you saw Mr. Elwood about noon?
A. About noon.
Q. You began your horse dicker in about four hours from the time you got here?

Objected to.

Q. Had you done any business in the meantime?
A. Oh, a great deal.
Q. Did you make an engagement at noon to go out with
99 him in the evening?
A. I did not.
Q. What sort of a buggy was it that you got into when you went out with him?
A. I do not know that there was anything uncommon in the shape of the buggy. I think it was a buggy with a box perhaps five or six inches in depth—square-box buggy, I guess they call them.
Q. Covered?
A. Covered.
Q. Was the top up?
A. The top was down when I got in.
Q. Did it remain down?
A. I think his son, John Elwood, put it up before we left the hotel. He was there at the time I got in.
Q. Did it remain up?
A. If he put it up it remained so.
Q. Do you know whether it was up or not?
A. I think he put it up.
Q. Do you know?
A. I would not say positively.
Q. How is your recollection now as compared with your recollection at the time of the last trial?
A. I can remember anything now that I remembered at that time.
Q. If you testified then the top was down it probably was down?
A. It probably was down if I testified so at the time. If you want to draw the thing pretty fine there is a distinction between down and

partly down in a buggy top. If I testified to the top being down, I suppose I must have meant the top thrown one joint back.

Q. If you put the top up it was probably to shield you from the rain?

A. That would be the object.

Q. If it was to shield you from the rain you would put it up entirely and leave it there, and you would put it up far enough to cover you?

A. Pretty apt to.

Q. And that would be entirely up?

A. And that would be entirely up; yes, sir. In one position, I suppose, it might be when thrown back, and another one when left down, and another one up.

Q. What was the state of the weather when you left the Kennard House?

100 A. I think it was slightly misty; that is my remembrance of it now.

Q. There was a little rainfall, was there not?

A. I don't hardly think it would do to call it a rain. It was quite misty, I think.

Q. Some people would have carried an umbrella?

A. Possibly; some are very delicate about such matters as that.

Q. When you said in your testimony in the last trial, There was a very light rainfall. Some people would have carried an umbrella and some would not, but there was a very slight rain, that was probably correct, was it not?

Objected to.

A. Emphasizing "very," perhaps it would be about it. Underscore very and you would have the thing pretty near right.

Q. That was your testimony at the last trial, was it not?

A. It is what would be described as falling weather; that I am pretty certain of.

Q. If that was your testimony at the last trial it was probably correct, was it not?

Objected to.

(By the COURT:)

Q. What did you say at the last trial?

A. I think I said it was a mist probably, a heavy mist; hardly be called a rainfall—a condition of weather that some people would carry umbrellas in and others possibly would not.

(By Mr. SHERWOOD:)

Q. Do you know now whether you did or not testify there was a very light rainfall? Did you not at the last trial testify that there was a very light rainfall at that time—some people would carry an umbrella and some would not?

A. I think I might have testified that way.

Q. That is probably correct, then, is it not?

A. Oh, it was misting and possibly there were drops of rainfall, for anything I know. As I told you before, I tried to make the thing understood clearly by saying some people would carry umbrellas and others would not probably have done so. That is the way I wish to be understood in the matter.

101 Q. You started to go down towards the depot?

A. Towards the depot.

Q. Started out to sample the horses?

A. Mr. Elwood wanted to show me——

Q. Never mind; just answer my question.

A. Simply to show how quiet the horses were about the cars; that is what he desired.

Q. You started out, then, with a view to examining the horses and determining what sort of horses they were?

A. Simply their quietude was the object at that particular time.

Q. You started out on a jog trot?

A. A slow jog trot.

Q. You went off out St. Clair and down on Bank at a jog trot?

A. No; I don't think we started on a trot from the hotel. I think he struck a little trot after we turned the corner into Bank.

Q. How fast was that jog trot?

A. From four to six miles an hour. Not to exceed six miles an hour. I don't think it reached that. I give myself some margin in that. I don't know that there was a speed indicator on the buggy, and if there was I did not see it.

Q. You were not paying special attention to the speed, were you?

A. The matter of speed was of no consequence at that time; that is——

Q. So you were not paying particular attention to how the horses were going?

A. I know we were going slow.

Q. You know they were going on a trot?

A. A slow jog trot.

Q. What do you call a slow jog trot?

A. From four to six miles an hour.

Q. Six miles an hour is a slow jog trot, is it not?

A. It would be so regarded in city driving. I know that is about my speed for driving at home, a very common speed.

Q. Six miles an hour you call a slow jog trot?

A. Six miles an hour is a slow jog trot.

Q. Those horses might have been going at the rate of six miles an hour?

A. It is possible. I don't say they were going at the rate of six miles an hour. I say I estimated it from four to six miles an hour.

Q. You have lessened the rate of speed since the last trial, have you not?

102 A. I don't know that I have. I think I mentioned it before as possibly six miles an hour.

Q. You were asked at the last trial: From the time you left the Kennard House until you struck the obstruction how fast was the team going? Do you remember that question?

A. No; I don't know that I remember that.

Q. And do you remember this answer: Known as a jog trot?

A. I don't remember that I do. The matter of the speed was broached, I recollect very distinctly.

Q. You may state now what rate of speed you were going at when you struck the mortar box.

A. Well, from four to six miles an hour.

Q. The same rate of speed you started out on Bank street?

A. I presume so; very close to it. Horses that are accustomed to be driven on the street are apt to strike about their street gait without any particular urging upon the part of the driver. I believe that is my experience in driving over cobbled and paved streets.

Q. When you ran in this paper and stuff that was in Bank street you were going at the same rate of speed, were you not?

A. Yes, sir; a jog trot.

Q. You turned out after running into this paper, making an obtuse angle, as you say, and at the same rate of speed continued your way north?

A. After we had gone over to the westerly side I suppose the speed was kept about the same as it was when we turned the corner—after we had turned the corner and gone into Bank street.

Q. It was pretty dark, was it not?

A. Yes, sir; it was quite a dark night.

Q. A very dark night, was it not?

A. Not unusually so for that time of year, I suppose.

Q. Yet it was so dark you could not see this paper and
103 stuff in the street?

A. I did not see the paper.

Q. You could not see it owing to the darkness of the night?

A. I don't know that I looked for it particularly. I heard the horses' feet in it.

Q. When you heard the horses' feet in it did you not take pains enough to look out of the buggy to see what it was?

A. I was on the opposite side. I could not see over. If I had tried to look I don't suppose I could have seen it without raising up in the buggy. Mr. Elwood was sitting between me and what seemed to be the material the horses' feet were disturbing.

Q. How far from the westerly curb were you driving?

A. I suppose eight or ten feet.

Q. Do you know how far?

A. It is an estimated distance.

Q. Did you pay any attention to it?

A. Yes, sir; I know when we turned the corner we were about eight feet from the lamp-post.

Q. You took sufficient observation of that so you can remember it distinctly?

A. I know Elwood made the turn about as I would make a turn in driving around in the streets at such a time.

Q. You observed all this?

A. I know we were not on the curb-stone. The buggy wheels were not grinding against the curb-stone.

Q. So that you cannot tell, with any degree of certainty within a foot or five feet, the distance you were from the curb-stone?

A. It is an estimation.

Q. Could you see the curb-stone?

A. Could see the curb-stone when under the light.

Q. Could you, when down in this obstruction—these paper boxes or whatever they were?

A. No; I don't think that I looked at the curb-stone then.

Q. Then, from the time you rounded the corner on Bank
104 street until you got into this rubbish or in the street, you do not know whether you veered towards the east curb-stone or veered to the westward?

A. I hardly think we did. A person in his sober senses can tell pretty close whether he is following a straight line or a zigzag line.

Q. Supposing you were in your sober senses, did you pay any attention to it at all?

A. Well, I have always tried to be pretty cautious.

Q. Did you, on this occasion, pay any attention as to whether you were going in a direct course or whether you were going off a direct course?

A. Oh, I did not have a compass; I did not take any observations in that manner.

Q. You were not expecting to run into anything, were you?

A. I suppose——

Q. Answer the question. You did not expect to run into anything?

A. No, sir; I had no reason for expecting to run into anything.

Q. For that reason you were not paying any particular attention to the exact line you were going?

A. I can't say I was paying special attention.

Q. You were not paying special attention to the distance your buggy was from the one curb or the other, were you?

A. Naturally, after we struck this stuff the horses' feet rattled in I did begin to pay attention.

Q. Oh, yes, then you thought possibly there was an obstruction, but did you notice the distance the buggy was from the eastern curb at that time?

A. I can't say that I did particularly.

Q. Now, you cannot tell, from the observation that you made at that time, whether it was one foot or ten feet?

A. Not from measurement. I could see we were not on the curb.
If we had been on the curb we would have got upset right
105 then and there.

Q. All you can testify as to that is the fact that you know you were not on the curb; that you were in the roadway?

A. We were in the roadway, where it is generally supposed a person has a right to be in driving upon the street.

Q. You say that this material that the horses' feet clattered into was on the near side of the horses—the left-hand side of the buggy?

A. No; I did not. I said the side Elwood was on.

Q. You did not take time to look over to see what the obstruction was?

A. No; I don't suppose I could have seen if I had looked.

Q. It was so dark you could not have seen the obstruction if you had looked?

A. It was very dark. I could hear the horses were stepping upon something different from the general condition in the street.

Q. They veered over to the left, then?

A. Yes, sir; got past the middle of the street towards the west.

Q. How do you know it was past the middle of the street?

A. Because there was a light about half way from where we upset and St. Clair street, and I could see we were pretty well over towards the westerly side of the street by that light.

Q. How close to the westerly curb did you get?

A. I suppose we went within twelve to fifteen feet of the west side. I am certain about that, because I could see when we passed this light, which was a hundred and fifty or two hundred feet below the corner of St. Clair and Bank, on the west side of the street.

Q. Did you follow a direct course then north?

A. Yes, sir; I am certain. We kept pretty well to the west side of the street—west of the middle of the street, making a straight track down the street.

Q. Then, after you got over onto the west side of the street, ten to fifteen feet from the westerly curb, you then made a direct
106 course north, did you?

A. As near as I could see.

Q. Was there anything along on the westerly side of the stret but the lamp-post that reflected light upon the westerly curb and the westerly side of the street?

A. Nothing but that light I spoke of as being about half way between the obstruction and St. Clair street.

Q. What was that?

A. I think that it was a light from a saloon or store or something of that sort. It was an enclosed light. It is possible it may have been one of the city lamp-posts; I am not clear. I have never examined into that since then. It is possible it was a city lamp-post, though.

Q. You were within ten or fifteen feet of the western curb?

A. Possibly fifteen feet—twelve or fifteen feet—estimated distance. Of this I am entirely certain and entirely clear, that we were west of a center line drawn north and south on Bank street—had the horses in that line.

Q. I have not any doubt of that. You are absolutely certain of it; but, now, when you got over to where you turned to go directly north, where, with reference to that particular point, was the light that was reflected out upon the street so as to enable you to see the curb and determine your distance from the westerly curb?

A. When we got to a point where I say we were west of a center line drawn through Bank street—west of a north and south line drawn through Bank street—we were nearly opposite this lamp, whatever it was. Whether it was a city lamp or whether it was a

private lamp I am unable to testify to, but it was a light of some kind that enabled me to see that we were well over on the westerly side of the street and could see the curb there plainly.

Q. From the point where you began to go straight north there was some light that reflected upon the curb?

107 A. Yes, sir; I could see the curb.

Q. And from that point you went due north?

A. From that point we kept about one position in the street. Then, as near as I could say, we were driving very nearly parallel with the eastern and western curb of the street.

Q. Now, how far had you gone in a northerly direction in going from the point of divergance on the easterly side to a point on the westerly side where you began to take a straight line?

A. I suppose we had made northerly in crossing that way; we had made northerly anywhere from fifty to seventy-five or eighty feet.

Q. Now, could you see the curb all the way along there?

A. No, I could only see the curb when we were at this light. This light, whatever it was, seemed to be a pretty good one, about the best light I saw along there except the one at the corner, at the drug store. That was a pretty good light.

Q. Did you notice any other lights along on Bank street?

A. Nothing that afforded any light.

Q. Did you observe any lights on the east side of Bank street after you left St. Clair?

A. It is possible there were lights along in business places—nothing that afforded any light out upon the street.

Q. Were there no gas lights on the easterly side of Bank street north of St. Clair?

A. None that offorded any light upon the street. There were lights back in store rooms. There appeared to be wholesale houses along there on the street, and at that time they were closed. There were lights in the stores, but nothing that afforded any light out upon the street. They were lights for watchmen probably in the stores, but they would make no lights upon the street.

A. And your team was going at the same jog trot all this time?

108 A. Yes, sir; I think they kept a pretty uniform speed along there.

Q. Now, then, do you remember being asked a question at the last trial about how many miles an hour that would be—that is to say, a jog trot—and that you answered, "I suppose it would be a speed that would carry a person in the neighborhood of six miles an hour"—not to exceed six miles an hour—is that correct?

A. Yes, sir; a jog trot is a speed——

Q. Never mind what a jog trot is. I ask you if that is correct?

The COURT: He asks if you said that before.

A. I presume I said so.

Q. Is it correct as to the rate of speed?

A. I say now the speed might be anywhere from four to six miles an hour. You can take either hour of that you please.

Q. You want to make that variation in your testimony on the last trial and on this?

Objected to.

Q. Do you remember whether or not there was a gas light on the westerly side of Bank street?

A. I have just been telling you about one.

Q. You don't remember definitely whether it was a gas light or a light from a building, do you?

A. I don't remember whether it was a city light or a private light. I am rather inclined to the belief that it was a private light, because it was a pretty bright one.

Q. You do not remember seeing a city light there at all?

A. I do not remember seeing a city light at that particular place. I remember seeing a pretty fair kind of a light.

Q. Do you remember any plumber's establishment down there on the west side of the street?

A. I think there was a plumber had a small shop there.

Q. Where was it with reference to the obstruction in the street?

A. The plumber was on the west side of Bank street, not far from half way between Johnson and St. Clair street.

109 Q. Was there more than one plumber's establishment there?

A. I remember but one.

Q. Were there any other stores than the plumber's establishment with lights or jets in the windows that reflected out sufficiently to disclose the curb?

A. No, sir; nothing that threw out any light that tended to light the thoroughfare.

Q. Could you see the curb while you were in the buggy at any other point than just this one at which you approached it?

A. On the westerly side I only saw the curb distinctly at this place where this light was located.

Q. Do you remember being asked the question on the last trial, "Could you see the curb while you were in the buggy?" and that you answered, "Occasionally as we passed a store. There were two or three little stores down there. They were on the east side, and we appeared to be pretty well over on the west side of the street. I know we were considerably past the middle of the street towards the west side. There were lights in those places of business, wherever those places of business were." Is that all right?

A. I am telling you the same thing in substance now. There was a light there.

Q. So that there was more than one place in which the light was reflecting out on the street?

A. You could see lights in the buildings, but there was one place in particular where I could see. There was light strong enough so I could see the curb-stone.

Q. What do you say now as to whether or not you saw it from the reflection of the light from more than one store?

A. I saw right in the vicinity of this light the curb very plainly. I have no recollection of seeing it at any other place, except right in what might be termed the immediate vicinity of
110 the light. Whether it was a private light or a city light I cannot tell you.

Q. Do you remember seeing any other stores there at all with lights in the windows?

A. Right at the place where I crawled onto the sidewalk, after being dumped out, there was a light back in the store. There appeared to be a drug store or a millinery store. I don't know what it was. It was such a light as a watchman would keep back in the store; must have been a light forty or fifty feet from the front of the store. I saw that light. That was the only one I saw in a store in the immediate vicinity.

Q. Anywhere along there?

A. I was up in the neighborhood where the light was strong enough to enable me to see the curb.

Q. You do not know definitely whether that was a light in a store or from a lamp-post?

A. I do not know whether that light was attached to a store, a private light or whether it was a city light. I know it was a pretty good light. We passed right along there in the vicinity of that light where I could see the curb-stone. I was enabled to see it by this light, whatever it was, whether it was a city light or a private light, whatever it was which enabled me to see the curb. That was a considerable distance this side of the place of upsetting there.

Q. Now, then, you were going directly or nearly parallel with the westerly line when you struck this obstruction which capsised the buggy?

A. Yes, sir.

Q. When the buggy was overturned you jumped, did you?

A. I made no effort to jump. I made an effort to land upon my feet. I hung onto the buggy as long as I could.

Q. How long after striking there did you hang onto the buggy?

A. After striking the obstruction?

Q. Yes.

111 A. Oh, it was a very brief time, I guess.

Q. The buggy was immediately overturned?

A. The buggy was over pretty promptly; yes, sir.

Q. Were you dragged any distance before you landed?

A. No, sir; I do not think I was dragged any, and the buggy did not go very far from where I landed.

Q. About how far was the buggy from where you landed?

A. I do not think it went twenty feet after upsetting. I do not think the buggy was over twenty or twenty-five feet away from me at any time.

Q. At the time it was stopped?

A. No.

Q. How far did you land from the buggy?

A. I dropped pretty close down beside the buggy. I suppose I barely cleared the buggy. The buggy was not over on its side when I left it.

Q. You saw it going and jumped out?

A. I did not jump out. I held onto it as long as I could.

Q. You did not make a leap, then?

A. No, sir.

Q. And go some distance in the street to get away from it?

A. No, sir.

Q. How long did you remain on the ground at the place you landed?

A. I did not lie there a quarter of a minute. I immediately made an effort to get up onto my feet. I did not know that my leg was broken.

Q. Finding your leg broken and that you could not stand up——

A. When I could not stand up and walk out of the street I had to do the next best thing, and got down onto my knee that was left sound and my hands and I got out that way.

Q. How long did you remain on the ground where you landed before you began to crawl off?

A. O, not a quarter of a minute. I was afraid to remain there.

112 Q. You thought possibly at that time of the night there would be vehicles passing up there?

A. I knew that was about the time of evening the trains were coming and going, and consequently carriages coming and going from the depot, and I thought that was not a very good place for me to stay and I had better get out of there.

Q. How long did it take you to crawl to the curb?

A. A half a minute, probably. A man can do a good deal in a half a minute if he is a little scared.

Q. How long did you remain on the curb before assistance came?

A. I think Elwood was back to me within three or four minutes. It could not have been longer than three or four minutes after I got to the curb that he was there—came to me.

Q. Now, it was so dark you could not see the obstruction from your place on the curb?

A. I imagined I could see them. I knew there was something there that upset the buggy.

Q. What is you recollection; could you see those obstructions?

A. I thought I could see something that looked like a box standing up there.

Q. Something dark?

A. I think it is likely my imagination helped me some, because I recollect the hub of the wheel of the buggy striking something that gave forth a hollow sound like striking a box. The wheel never was upon anything. It was the hub of the wheel struck whatever it was. The wheel never mounted anything except some sand or something of that sort that was lying in the vicinity.

Q. Then the wheel did not go on top of the box?

A. No; the wheel did not go on top of the box.

Q. The hub simply struck, and it was the running upon the sand pile that overturned the buggy?

A. That is my theory about the thing, but there was some sand or something there that started it up, and the same instant it
113 struck this sand or in a very brief time after that the wheel struck the box.

Q. Was not the overturning and striking of the box and the raising of the buggy wheel and the overturning of the buggy there almost simultaneous?

A. Well, it was a continuing of the same occurrence right on. There was no interval that one could detect. As I testified, I felt the buggy careen and then strike the box.

Q. It was not owing to the box being there at all that the buggy was overturned there, was it?

A. I suppose the box contributed a portion of the cause.

Q. Will you tell us how the striking of the hub of the buggy against the box could contribute to its overturning?

A. Yes, sir; I think I could make a little drawing that would illustrate that pretty thoroughly.

Q. How can it be done? Was the blow direct against the side?

A. I do not know that it was. The box may have been standing up in a perfectly upright——

Q. It may have been, but I want you to tell just exactly how that was, if you know.

A. I do not say that I know. I saw those things were there. I imagined, at least, when I was sitting on the curb, I could see those things were there.

Q. I do not care for your imagination at all; I want the fact; we are trying this case on facts and not on imaginations.

A. I think it must have been pretty nearly as I say.

Q. What was the size of that box?

A. I was not near enough to it to tell you the size with any degree of accuracy. I saw the box. I imagined I could see it off in the dark there, a distance of some 22 or 23 feet from where I was sitting.

Q. The only observation you got of the obstruction was
114 from your position on the curb, was it?

A. The only observation I got of it.

Q. How was it that you were able to tell at the last trial the size of that box against which the buggy ran and was overturned—supposed to be?

Objected to.

A. I do not know that I did undertake to.

Q. Do you remember being asked at the last trial, "Could you tell from anything you saw how high that mortar box or obstruction was?" to which you made answer, "It may have been two or two and one-half feet. I do not think it would exceed two and one-half feet in height."

Objected to.

A. I think I answered in general terms, about as I have done at this time. It was an estimate. I did not go to measure it. I told you I never measured anything there.

Q. You did not see it at all, did you, except as you imagined you saw it?

A. I thought I could see it through the darkness. I think that I got something of a view of it when this carriage of the 'Bus Line Company came there and was making their turn to get into shape so that I could get into their carriage. I did nothing towards getting the carriage into position. I was sitting there and was ready to be put in when they got it into position. They had very good lights on that carriage and I think I may say that I saw the box and this rubbish pretty distinctly while that carriage was backing to get into position for me to get in.

Q. Now, that is some testimony you did not think of at the time of the last trial?

Objected to.

Q. State whether you said anything about seeing that box from the light of the carriage that came to carry you away at the time of the last trial.

A. If I was questioned on that matter.

115 Q. That does not answer the question.

A. I do not recollect.

Q. Is not that something that has occured to you during this present cross-examination?

Objected to.

A. I think I had a saving clause in this way——

Q. That does not answer my question. I object to your coming in and arguing this thing.

A. I think I may say it is a part of my general recollection. I had no means of seeing anything distinctly any other way at that place.

Q. Now, then, up to the time that the carriage came there with lights upon it you had not seen this box, had you, so as to be able to determine its dimensions?

A. No; I do not think I had. There was nothing about there to enable me to see it distinctly.

Q. Did you not testify at the time of the last trial, in answer to the question, "Do you remember of seeing it at all?" "Oh, yes; near the light in the street there. I was close enough to it so I could see it?"

The COURT: Did you say that before?

A. I do not remember saying that. I may have said so, but I do not remember it now.

(By Mr. SHERWOOD:)

Q. How wide is the buggy—how wide a track?

A. I think what we call a yankee track is about four feet eight inches.

Q. Is that the dimension of this buggy?

A. I guess it is a regular yankee track buggy. In Pennsylvania our buggies are wider tracked.

Q. When you were capsized you landed close to the buggy, did you?

A. I could not have been very close—not right close up, for I would have dragged into the wheels. I must have gone a little distance away from it to have cleared it. When the buggy was in a careening position I certainly went far enough from it to clear it, because the buggy I do not think struck me. I have no
116 remembrance of it striking me.

Q. Were you thrown six feet from where the buggy stood in an upright position?

A. I think it is quite likely that I landed six feet from the right-hand wheel—the wheel which struck the box.

Q. That would be a foot or a little over fifteen inches from the left-hand wheel, then?

A. Might have been twenty-four inches; might have been twenty-six.

Q. Was it six feet from the left-hand wheel of the buggy?

A. No; I do not think it was.

Q. When you were on the curb did you look around any to see what was in the vicinity of the obstruction?

A. Well, I do not know that I looked to see whether there was anything unusual there more than an obstruction. I knew there must be an obstruction out there in the street.

Q. Yet you could not see the obstruction?

A. Yes, sir; I think I could see it, but not distinctly. I have been telling you all the time that I could not see it distinctly.

Q. You said you imagined you saw it.

A. I suppose my imagination helped me some. I knew there must be something there; otherwise I would not have been upset.

Q. You could not locate the distance it was at all from the curb, could you? You could not see it sufficiently distinct to make an estimate of its distance?

A. Not in feet and inches or anything like that. I could make something of an estimate.

Q. Did you make an estimate at the time as to the distance that obstruction was?

A. I know I supposed it must be some twenty-five feet from the curb.

Q. From the curb where you were and what you imagined to be the obstruction?

A. Yes, sir.

Q. Did you see any lights around there?

117 A. No, sir; there were no lights on the obstruction—none whatever.

Q. You took particular pains to observe that, did you?

A. Indeed I did.

Q. Did you look around to see whether there were any other lights in the vicinity—any other lights except what you have described?

A. I did not notice any others.
Q. Did you notice one on the corner of Johnson street?
A. If there was one there it was very dim; I did not notice it.
Q. You imagine it to be dim because you did not notice it?
A. Yes, sir; if it had been a bright light it would have attracted my attention.
Q. Did you notice any light in the building across the way—across Bank street, on the eastern side?
A. I presume there were some of those little drinking places along there that had lights back in them. I don't know that they had.
Q. Did you notice any lights in the front window?
A. Nothing that cast any light out on the side of the street that would afford any guidance to a person going down the street.
Q. Now, you took particular pains as you sat there on the curb to observe all these things?
A. I looked it over pretty thoroughly—as well as I could with the lights I had.
Q. With a view to a lawsuit?
A. No, sir; that thing did not enter my mind at the time. That was a subsequent thought entirely. I was thinking about getting where I could be comfortable; that was uppermost in my mind.
Q. You were in pain?
A. Yes, sir; and pretty mad, too.
Q. Pretty bad?
A. Out of humor; out of humor a good deal.
Q. Are you still in business in Pittsburgh?
A. I am interested in business in Pittsburgh; not taking any active part in the business, though, at the present time.
Q. How long did you continue in business there?
118 A. I took an active part in our business until 1884.
Q. Are those mills still running?

Objected to.

Redirect examination:

Q. Mr. Sherwood called your attention to the business you transacted in Cleveland on that day. You may state what it was.
A. I was making some settlements with the Cleveland——

Objected to; objection sustained; exception by plaintiff.

Testimony of Dr. Proctor Thayer.

Dr. PROCTOR THAYER, called on behalf of the plaintiff, being sworn, testified as follows:

(By Mr. WILCOX:)

Q. Where do you reside?
A. Cleveland.
Q. What is your business?
A. Practicing surgery and medicine.
Q. How long have you been engaged in the practice of surgery?

A. Since 1849.

Q. I will ask — you remember the accident to Henry King in 1879?

A. I do.

Q. I will ask you if you were called to assist him at that time?

A. I was.

Q. Where did you find him and when did you go to see him?

A. I found him at the Kennard House, in the evening.

Q. On the day of the accident?

A. The day of the accident; soon after the accident.

Q. State what condition you found him in.

A. I found him upon his bed, stripped. Dr. Sterling was there examining his leg and I examined his leg. I found him with a broken leg. It was broken close to the joint, the left leg, I will say. There was no doubt about it at all, and it was understood Dr. Sterling was attending, and I left.

Q. What was the condition of the leg as to inflam-ation?

A. There had not been time for that yet. It was a recent affair—just occurred.

Q. Did you undertake to set the bone or anything like that?

A. I should say not. I settled the question that the leg was broken, and left. I did not attend him. Dr. Sterling attended him.

Q. Did you see him after that?

119 A. Yes, sir; I think I went the next day to assist Dr. Sterling adjust it. I think I went two or three times to see him. He was taken out of the room I first saw him in and taken to another room and got him in a position where we proposed to let him remain until recovery.

Q. You may describe to the jury the character of the injury.

A. This bone (indicating) seemed to be broken almost square across; could hear the crunching of the bones when the leg was moved—a thing we always get in broken bones. The leg was not very much swollen at that time, but after that the leg became enormously swollen.

Q. Showing that the knee-joint was involved?

A. Probably.

Q. What do you say as to the character of the injury, as to whether it is permanent or not?

A. The fragments of bone may be united and it may be well enough, but there is a great variety of complications in fractures. There may be a permanent disturbance. I did not see it enough to see how much it was disturbed. I saw him during the process of repair, as he got better, and I did not see him any more until I saw him here on the trial. I do not know how much he has suffered or what way he has suffered. I know the leg was broken near the joint.

Q. Could you tell by a present examination as to its permanency or not?

A. Some things I could tell. I never can tell whether a man is in agony or not. I can only feel deformities, bunches, or anything that is abnormal in the neighborhood of the fracture; that is all

He may suffer pain all the time and I not know that, only as he tells me.

Q. I will ask you if you have at any time examined the location of the accident on Bank street?

A. I did, that night.

Q. What time in the evening was that?

120 A. It was the fore part of the evening. I cannot tell the exact time. I was there but a few minutes and I went right from his room. I was told how it occurred and I went right from his room down in the neighborhood of where this was said to have occurred. I only know as I was told, that it was there.

Q. Did you see the obstruction there on the street?

A. It was a little dark. I did not see anything very definitely.

Q. Did you go close to it?

A. I did not go for that. I went to see if there were any lights on the obstruction.

Q. What was the result in regard to that?

A. There was none there.

Cross-examination by Mr. SHERWOOD:

Q. At whose request did you go?

A. My own simply. No one suggested it. I knew there would be a lawsuit and I went to take care of the city. That is the fact of it.

Q. Interested in behalf of the city?

A. I was interested in behalf of the city. I had learned he was from Pittsburgh. He said nothing about a lawsuit.

Q. Where was it you went from?

A. From the north door of the Kennard House up to Bank street, and I looked down toward the lake, and then I crossed over and went down the block on the corner of Bank and St. Clair—that stone building on the northwest corner. I went down there a ways so I could get both sides of the street, to see if there were any lights to indicate there were obstructions, and I saw none.

Q. Then you did not go further down than the corner of Bank and St. Clair street-?

A. I said I did go further down.

Q. How much further?

A. I went down on that stone building—I only went part way down that stone building—on the northwest corner of Bank St. There is a stone building—Mr. Hoy's building, I guess. I think Mr. Hoyt built it.

121 Q. On the northwest corner of Bank and what street?

A. Bank and St. Clair street- we are talking about all the time. I looked down on the east side of Bank street, and I crossed over and looked down on the other side of the street, and there was no light whatever on that street—that is, no light that indicated there were obstruetions there. I went there for that purpose.

Q. How far down Bank street did you go?

A. I went, I say, part way down that stone building.

Q. Can you estimate it in feet?

A. No, I cannot tell you. It was not a very great distance. I could see a light standing on the corner, and see clear through to Lake street. I was looking for lights indicating the obstruction. I did not look for any other lights whatever. The street was dark. There could not have been, because I was looking for lights that would indicate the obstruction in the street. I had just the one object in view.

Q. When you examined this fracture was there anything about it to indicate anything in an abnormal condition?

A. At this time the leg was not badly swollen. He was a large, fleshy man. It was so recent the leg was not badly swollen and, being a square fracture, there was no special deformity. It was so near normal Dr. Sterling said to me, "It is not fractured, from the fact there seems to be no deformity about it." I commenced twisting the leg and we could hear this crunching of the broken bones; but for that we would not have known it was broken. The joint must have been implicated, for he had a very large, swollen, and painful joint for a long time.

Q. Did you set the bone?

A. There was not much setting to do, for I say there was not any displacement of the bones. The splint was put on to keep it in its position. There was a great deal of inflam-ation. The joint was implicated some, puffed up here as big as a fellow's head
122 almost. Then he was transferred to another room, and he was watched to see that the leg did not get out of place; fixed up an apparatus for him, and he lay there in the room for a long while.

Q. Do you know how long?

A. No, sir.

Q. Do you know what his condition was when he left the city?

A. The leg was fair. I know it was not fully recovered. You can ascertain from Dr. Sterling in regard to that, for I saw him but a few times.

Q. If there are no complications connected with a fracture of that kind what is usually the result of the healing process restoring the limb entirely?

A. If there are no complications, if it is but a simple fracture and the bones are put in position, the probability is there will be a good result, as far as the bone is concerned; but there are really no two cases alike, and one may have a good bone and suffer all through life with neuralgia——

Q. What would be the effect, simply supposing it to be healed thoroughly?

A. If there is pain or weakness about the limb he would favor it, and he would go limping on it, although there might be no deformity. A fractured limb will not be quite as it was before it was fractured.

Q. Is there any reason why with a proper knitting of these bones the limb might not be used—the joint there might not be used?

A. Well, it might have been perfectly stiff if it had not been well managed. I think it was exceedingly well managed. There might

have been anchylosis—stiffness of the joint. I might say that in this point (indicating) right behind this bone here we have a large number of vessels and nerves that go down below that afford
123 protection to the bone, and in the knitting of a fracture there is piled up callus about the fracture and we cannot expect it to be as strong as it was before. That callus may chafe and work upon the nerves and blood vessels in the rear, which could not occur in front because the blood vessels are not there. That is a source of constant agony. Those nerves and vessels will not stand any such mechanical disturbance.

Redirect examination:

Q. From such an injury to the knee, what effect would there be upon the circulation below?

A. There is a piling up of bone there, more or less, and it might be to the point of absolutely, for the saf-ty of the leg, to require amputation.

Q. What do you say as to the treatment this case had as to being the most approved?

A. My dear sir, it was just as perfect as it could be made. Great pains were taken with him, and he was a good sort of a fellow, and there was no hinderance to prevent a doctor doing his whole duty. It is a very imperfect leg (here viewing leg), so far as the bones are concerned. I cannot get anywheres near them, but any one can see something has disturbed the circulation.

(To Mr. King, the plaintiff:) Was this leg good up to that time?

Mr. KING: Yes, sir; I had a perfect leg.

Dr. THAYER: If there is nothing else to account for the present state of things, the injury we are speaking about did all this work, and it is a permanent and serious injury to him.

Q. What would be the result if he did not use bandages on this leg?

A. If he did not use bandages he would constantly have ulcers on the leg in consequence of the disturbance of the circulation. There is a difference in the size of his legs and there is a difference in their circulation. If he was well before, he is certainly in a worse condition than I supposed.

Q. What do you say this length of time after the accident,
124 finding the leg in its present condition, as to the injury being permanent?

A. It will be permanent. He will never get over it. He has all the time to be on the lookout or he will have very serious ulcers in his leg, producing annoyance, suffering, and shorten his life. He must keep it bandaged all the time or wear a stocking, or use some mechanical appliance to keep open the circulation. He might get ugly ulcers, which would run him down.

(By Mr. SHERWOOD:)

Q. Of course, that is all based upon the hypothesis that the leg was perfect before?

A. He says it was perfect. I don't know. I never saw him until

that night. But the night I saw him there was no such an appearance of that leg as there is now. It was a good, fair, nice-developed leg. It was not swollen at that time. It takes a while for an injury to swell. This must have been pretty soon after the injury—I don't think an hour. It was not so much swollen the next day, but after a day or two then it was as big as your head; it looked as though it would burst open.

Permit from board of improvements of the city of Cleveland to E. Rosenfeld to build block No. 62, on Bank street, in said city, as contained in City Book of Permits of Board of Improvements, page 643, was here offered in evidence on behalf of plaintiff, the same being objected to by defendant; which objection is overruled; to which ruling the defendant then and there excepted; a copy of the permit being as follows:

Permit.

OFFICE OF THE BOARD OF IMPROVEMENTS,
CLEVELAND, *July 16th*, 1879.

Permission is hereby granted to E. Rosenfeld to occupy a portion of the street, not exceeding one-third thereof in width, from the east line, provided he use only one-half the sidewalk therein included, in front of premises owned by same, No. 62, on Bank street, for the period of sixty days from the date hereof, for the purpose of placing thereon building materials, subject, however, to the provisions of the ordinance that he shall "protect said materials with a sufficient number of lights from dusk until daylight during every day that the same shall remain thereon," and in case he shall neglect the duty imposed by above provision he shall, "in addition to the penalty imposed by this ordinance, be liable for all damages to person and property growing out of such neglect." Said party must keep the gutter always unobstructed, and shall in no case use said street, under this permit, in such manner as to obstruct or interfere with the passage of street cars. This permit is revocable at the pleasure of the board of improvements.

By order of the board:

W. E. SHERWOOD, *Clerk.*

Also permit under date of September 19th, 1879, to Frank Kostering to occupy a portion of Bank street, not exceeding one-half, in front of the premises No. 62 Bank street, offered in evidence on behalf of the plaintiff. The same was objected to by defendant; which objection was overruled; to which ruling the defendant then and there excepted; a copy of which permit being as follows:

Permit.

OFFICE OF THE BOARD OF IMPROVEMENTS,
CLEVELAND, OHIO, *Sept. 19th*, 1879.

Permission is hereby granted to Frank Kostering to occupy a portion of the street, not exceeding one-third thereof in width, from

the east line, provided he use only one-half the sidewalk therein included, in front of premises owned by Rosenfeldt, on Bank street, for the period of sixty days from the date thereof, for the purpose of placing thereon building material, subject, however, to the provisions of the ordinance that he shall "protect said materials with a sufficient number of lights from dusk until daylight during every
126 day that the same shall remain thereon," and in case he shall neglect the duty imposed by above provision he shall, "in addition to the penalty imposed by this ordinance, be liable for all damages to person and property growing out of such neglect." Said party must bridge the gutters and keep them always unobstructed, and shall in no case use said street, under this permit, in such manner as to obstruct or interfere with the passage of street cars.

This permit is revocable at the pleasure of the board of improvements.

By order of the board:

[SEAL.] W. E. SHERWOOD, *Clerk.*

The above is an exact copy of original permit.

JOHN H. FAILEY,
Pres't Board of Improvements.

Feb. 5th, '84.

Plaintiff also offered in evidence two sections of the ordinances of the city, contained on pages 219 and 220 of the Book of Ordinances, as follows:

SEC. 4. No person shall place or cause to be placed on any street, lane, alley, or public ground any material for building purposes without the written permission of the board of city improvements. Such permission shall specify the portion of the sidewalk and street to be used and the period of said use, which shall not exceed two months, and in no case shall any person use more than one-half of the sidewalk and half of the street. The council may at any time revoke such license. At the expiration of the permission or on the revocation of it said person shall remove said material from the street.

SEC. 14. Whenever any person or persons, whether contractor or proprietor, shall be engaged in the erection or repairing of any building or other structure whatever within the city and shall
127 cause or permit any building materials, rubbish, or other thing to be placed on any public street, lane, alley, or sidewalk, or other place in the city where persons pass and repass; and whenever any person or persons who shall be engaged in constructing any sewer or laying any gas, water, or other pipes or conductors in or through any of the streets, lanes, alleys, highways, sidewalks, or other places in the city where persons pass and repass, whether by appointment of the city or its agents, or as contractor, it shall be the duty of all such persons to protect, with a sufficient number of lights, the materials, rubbish, goods, wares, and merchandise, heaps, piles, excavation, or other things so caused or permitted by them to be or remain in or at any of the places above mentioned, and in

such manner as to be distinctly seen by all passers-by, and to continue such lights from dusk until daylight during every night while any obstructions of the above-mentioned description are allowed to remain in or at such places; and every person who shall neglect the duty imposed by this section shall, in addition to the penalty imposed by this chapter, be liable for all damages to persons and property growing out of such neglect.

Testimony of Dr. Elisha Sterling.

Dr. ELISHA STERLING, called by plaintiff, being sworn, testified as follows:

(By Mr. WILCOX:)

Q. Where do you reside?

A. In Cleveland.

Q. And what is your business?

A. Surgeon.

Q. How long have you been engaged in the practice of medicine and surgery?

A. Thirty-five years.

Q. Do you remember the occasion of the accident to Henry King, in November, 1879?

A. I do.

Q. I will ask you if you were called upon to attend him?

A. I attended him.

Q. Where did you first see him?

A. I saw him at the Kennard House, in a little room off the office.

128 Q. Immediately after the accident or soon after?

A. Within twenty minutes, probably.

Q. State in what condition you found him at the Kennard House.

A. I found him on a small bed in a side room there, lying with his clothes on, just as he was brought in after the accident. Upon examination I found a fracture just below the knee. I brought some bones with me, and we can probably get at it quicker with them. This (indicating) is the main bone of the leg, the femur, and this (indicating) is the tibia, the main bone of the leg below, and here is a small splint bone. There is the position of the bones. Here (indicating) is where the bone was broken. This bone was broken across here. This is a smaller bone than his. This is a bone from a young woman. This bone was fractured right thro' here into the knee-joint at this point. The splint bone was broken here, but not dislocated. This is the knee-cap—the cap bone. Fracture was produced by stepping out on his feet; it was not produced by falling on his knee. Being a very heavy man and not conscious of the distance he was going to fall, he received this unusual fracture. On top of the knee-cap there was an abrasion of the skin. This was the result of falling after the fracture. Shortly after I was called in Dr. Thayer came. He examined the leg and went off. I fixed Mr. King up that evening as well as I could, and about eleven

or twelve o'clock I came in, and he was suffering a good deal of pain. I gave him some morphine to quiet him. In the meantime a special bed had been prepared to put him on, and the next morning Dr. Thayer came with me and we fixed him out. For ten or fifteen days the inflam-ation of the knee was so great we had to keep on ice dressings to keep down the inflam-ation; but everything progressed well, and I think about the thirtieth day—thirty or thirty-five days—after the injury he was sent by a special car to Pittsburgh. It was not a compound fracture. There was no opening or injury of the skin connected with it, but there was an injury to the
129 joint, and there was a good deal of suffering, a man of his age and weight lying on his back for thirty days.

Q. What was the effect in the knee-joint—about the fluids in the joint?

A. For a time there was the usual amount of swelling, but that was kept down by the application of ice water.

Q. How long was he there?

A. I think some thirty days he was under my care. He was sent on his bed to Pittsburgh.

Q. You have seen him since that time, have you not?

A. Several times.

Q. He has consulted with you when in the city here?

A. He has.

Q. Do you know from your subsequent examinations what the progress of the case was for some time after that?

A. As far as the trouble with the joint is concerned, he has almost recovered; you might say the joint is as good as the other one, but it has left him with a swollen leg, from which he will never recover; he cannot.

Q. You think his present condition is a permanent one?

A. The swelling of the leg. He has to wear a bandage, and always will have to wear one.

Q. What would be the result if the bandage was left off?

A. In six months he would have to go on crutches, and eventually have ulceration about the ankle, and finally what we call varicose ulcers. I doubt if in three months he would be able to walk. I judge from having seen him. I saw him last spring, and I think a year or eighteen months ago I advised him first to put on a bandage. The ankle then was very much swollen. All of which is the result of the fracture.

Q. Perhaps I need not ask you what the effect was upon the circulation; that is, perhaps, covered by your last answer to a certain extent?

A. It retarded circulation, lying on his back. You see,
130 nature, in reproducing, mending up a fracture, enlarges and deposits there, and the result of that was that it pressed on the large veins and arteries—the veins particularly—on the under side of the leg. That is what produces these large veins and swelling. To a certain extent the veins have restored themselves—that is, a collateral circulation. In the meantime it has left him with a permanent trouble, from which I know he never can recover.

Q. What do you say as to the result of the treatment being a good result?

A. It was better than could be expected. If he got well with a stiff knee it would have been considered good surgery.

Q. And the result is still better than that?

A. Yes, sir.

Q. What do you say as to the action of the knee and limb now as compared with the well limb?

A. I do not suppose it can be possibly as good; but still, so far as the result is concerned, he ought to be satisfied. An injury of that kind twenty-five years ago would have been a matter of amputation or a risk of life. There have been improvements going on in the profession the same as in everything else.

Cross-examination by Mr. ROBISON:

Q. Are those bones one set—do they belong together?

A. Yes, sir.

Q. What do you call that upper bone?

A. This is the femur, the left side.

Q. And the other?

A. The tibia.

Q. The shin bone, you call that lower one, don't you?

A. Yes, sir; the shin bone.

Q. What is that other bone?

A. This is a splint bone. It answers simply as a splint. It has no connection with the articulation of the knee-joint.

Q. This is to regulate the foot somewhat, is it not?

A. Yes, it holds the foot in place. It is a splint bone, the fibula.

Q. This was broken here and split there (indicating)?

A. Yes.

Q. How do you account for splitting that through there?

131 A. From the force brought on it in stepping—coming down directly.

Q. This bearing on the outside pressed it out?

A. It broke it right through here (indicating).

Q. How deep was this fracture?

A. Right across entirely.

Q. Was this out of place, fractured, or broken?

A. This was broken. This being bent down, there is a projection now. If you see Mr. King's knee you can see a projection there. The cap went on here. The large muscles come over here and are attached there—the extensor muscles of the thigh. This has no other meaning, only as a sort of fulcrum. It is merely a fulcrum, a very nice arrangement. The fracture was caused by his coming on his feet this way (indicating).

Q. That knocked that off, so that this must have been turned that way a little, must it not? If it had been square exactly up and down it would not have knocked that off, would it?

A. Yes, sir; it would. Here is where the weight first came, and here was the fracture, and this was fractured, too. It all happened at once. His leg doubled up under him. It could not have hap-

pened in any other way. It broke in its weakest point, and that is across here.

Q. But if it had not been turned so as to relieve this, this would have held that, would it not?

A. No; it turned out a little. It must have to produce a fracture of that kind. You could get a fracture almost like that by coming directly on the knee, but a direct blow would have been so great as to have injured the tissues.

Q. So you think that that was done by the foot striking onto the ground that way (indicating)?

A. That, I think, was the first, because if it had been done by a direct blow there would have been some injury over the knee-cap.

Q. How do you account for that other bone being broken?

A. In the same way. This is attached by strong ligaments to this part, and when this gives way here this must necessarily
132 fracture somewhere.

Q. Then, of course, all this fracture business and what you say about that simply comes within the law of mechanics?

A. Entirely. I suppose that — Mr. King had known he was going to jump out of that buggy he would have jumped out without injuring that bone, but it was unexpected. It is one of those fractures that happen by accident. A man can break his leg slipping upon the ice. He does not fall and break his leg; he breaks his leg and falls. Contraction of the muscles will fracture a bone. Now, where the muscles are perfectly prepared, intentionally, a man can make a jump and not break his leg, whereas if he is pushed accidentally and is not prepared the bone will give way. Now, from what I know of this case, I know that the injury must have happened from accident; not from an intentional jump, but from necessity. The parts gave way, not being prepared for it, and a large weight coming upon it produced this fracture. I cannot account for it in any other way. It is an unusual fracture. It can only be accounted for in that way.

Q. You made a very fine, successful surgical operation there, did you not?

A. The profession did; thanks to the profession. I propose to keep up with the advancement in our profession.

Q. You do not know of any special interception of the knee action, do you?

A. The knee has but one movement, flexion and extension.

Q. Is the action of his knee affected now or intercepted by this abnormal condition, in any way?

A. No, I think not. I do not suppose it is equal to the condition it was in before he received the injury, but he has a good serviceable knee, and, as I see Mr. King, he walks without a cane, which shows that he has got a good leg, as far as the injury is concerned.

Q. And he has got a little more bone now than he had on the start, has he not?

A. No, not a bit.

133 Q. Did not the deposit there increase the size?

A. That was absorbed afterwards.

Plaintiff offered in evidence sections 4 and 14 (pages 219 and 220) of the Ordinances of the City of Cleveland, which are hereinbefore inserted; received subject to objection.

Testimony of Emanuel Rosenfeld.

EMANUEL ROSENFELD, called by plaintiff, being sworn, testified as follows:

(By Mr. WILCOX:)

Q. I will ask you if you are the owner of the property on Bank street where this building was being constructed in 1879?
A. Yes, sir.
Q. It was constructed under your direction or order, I suppose?
A. Yes, sir.
Q. Do you know anything about any obstruction whatever in Bank street during the construction of that building?
A. Yes, sir.
Q. When did you commence the construction of that building?
A. I suppose some time in July, 1879.
Q. How frequently were you about the premises during its construction?
A. Very seldom.
Q. How many times, do you suppose, during the building of your building?
A. I suppose I was there a few times a week.
Q. When was the building finished?
A. The building, I suppose, was finished the latter part of October. I mean as far as the building proper is concerned, not the inside.
Q. When was the outside of the building completed?
A. The mason work was completed very soon after, because there was very little of it done inside.
Q. Could you fix about the date?
A. It commenced to get cold about that time, when they got through finishing. I can't tell the exact date.
Q. Do you remember about the time of the accident to Mr. King?
A. Yes, sir.
134 Q. What was there there at the time of the accident, if you know?
A. There was a little bit of sand there, some refuse matter of bricks, I suppose—broken bricks—did not amount to much—and the mortar box and the lime box outside.
Q. How long had they been there?

Question objected to by defendants. The objection was overruled by the court, and defendants then and there excepted.

A. I could not very well tell.
Q. How long did you see them there?
A. I could really not tell.
Q. Come as near as you can.

A. I could not tell, for the reason that they always changed their materials and their tools, what they used in the process of building; so I never paid any attention.

Q. About how long—whether it was a week or a month or two weeks or six months?

A. I might have noticed them the week before, but I could not tell positively as to that, whether the identical box was there at that time.

Q. Might they not have been there two weeks before or a month before?

A. I could not tell you; I don't know.

Q. You say you were there two or three times a week?

A. Yes, sir; so I was.

Q. From the time you got the permit?

A. I never got that permit.

Q. Did you not take a permit?

A. Not for that purpose.

Q. Did you not take this permit in July?

A. No, sir; I did not.

Q. Who did take it?

A. Mr. Kostering.

Q. Was there not one issued to you in July?

A. Mine was issued in May for digging the basement—the cellar.

Cross-examination by Mr. SHERWOOD:

Q. Did you get more than one permit?

A. No, sir; not to my knowledge.

Q. Was there any building material put in the street under
135 that permit issued to you?

Objected to; objection sustained on the ground that the question is not cross-examination.

Q. Do you know of any building material being placed in the street in July?

A. Not that I know of; no, sir.

Q. Do you know of any building material being placed in the street between the sixteenth of July and the sixteenth of September, the dates covered by this permit?

A. There might have been later than July, because the fore part of the building was all in the basement. The foundation stones and cellar stones were all hauled right inside the excavation.

Q. Do you know how long that lime box and mortar box stood in the street out there?

A. I do not.

Q. Was it placed there under your permit?

Objected to.

The COURT: Leave out what he did under permits; he is not the judge of that. You must simply find out what he did.

(To WITNESS:) You did not place it there?

A. No, sir.

Testimony of Frank Kostering.

FRANK KOSTERING, called by plaintiff, being sworn, testified as follows:

(By Mr. WILCOX:)

Q. What had you to do with the construction of this building on Bank street, on the property of Mr. Rosenfeld, in 1879?

A. I had to do the whole entire mason-work on it. I was the contractor.

Q. I will ask you if you took out a permit from the city for that job?

A. Yes, sir.

Q. Do you remember when you took it out?

A. I could not tell the date any more.

Q. Do you remember the time of the accident to Mr. King?

A. Yes, sir.

Q. I will ask you if at that time there was any building material, mortar box, lime box, &c., in the street?

A. Yes, sir.

Q. How long before that had there been obstructions of like character there?

136 Question objected to by defendants. The objection was overruled by the court, and defendants then and there excepted.

A. It was all there during the time we done the brick-work and the plastering.

Q. How long did it take you to do the brick-work and the plastering?

A. I think it was in the latter part of October when we started the brick-work. First, when we done the basement, understand, we had all the stuff in the basement; we had nothing on the street; we hauled the stone right into the basement.

Q. It was there during all the time you were doing the brick-work and plastering?

A. Yes.

Whereupon the plaintiff rested.

Defendant thereupon moved the court to direct the jury to return a verdict for the defendant, on the ground that no case had been made out against it; which motion was overruled by the court; to which action and ruling of the court defendant then and there excepted.

And the said defendant, to maintain the issues on its part, offered and introduced the following testimony:

FRANK KOSTERING, a witness on the part of the defendant, being duly sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. What is your business?
A. Contractor and builder.
Q. You were a contractor and builder in the fall of 1879?
A. Yes, sir.
Q. And had the contract for the mason-work of Mr. Rosenfeld's block on Bank street?
A. Yes, sir.
Q. What was the size of that lot on which the building is erected?
A. I think it was forty-one feet and some inches by ninety feet.
Q. How much of that lot was covered by the building?
A. The whole, entire lot.
Q. What was the height of the building?
A. Four story and a basement.
Q. It is a brick block?
A. Yes, sir.
Q. What was on either side of that building?
137 A. On the north side was an old frame building at that time, and on the south side there was Mr. Schuepbach's place, right on the line. I believe it was a couple of inches from the line.
Q. In constructing that building where was the building material placed?
A. In the basement. We done the whole thing all in the basement. We had to drive right through the sidewalk and haul our stone and material in there till afterwards, in the brick-work—the superstructure work—we had it all outside on the street.
Q. What other place was there for putting building material?
A. There was no other place at all.
Q. How much material was on the street on the 12th of November, 1879?
A. There was a mortar box and a lime box and some mortar—plastering mortar—that we made up just for the plastering, and there was a little sand there left, and a little bit of sand, what was left from making up the mortar.
Q. How much of the roadway was occupied by this building material at that time?
A. To my recollection, it was twenty-four feet when we measured it that time—that next morning.
Q. Did you make a measurement of the distance into the street the material extended?
A. Yes, sir.
Q. When did you make that measurement?
A. The next morning, about seven o'clock.

(By the COURT:)

Q. Let the jury understand how that is. From the east side west twenty-four feet was occupied?
A. From the east side towards the west side, twenty-four feet.

(By Mr. SHERWOOD:)

Q. What was the occasion of your making the measurement there of the distance from the easterly curb to the outside of the building material?

A. The night before I understood there was an accident happened there. I heard that there was an accident the night before.

138 Q. In making that measurement was there any memorandum taken?

A. Yes, sir.

Q. And what was done?

A. There was a plan drawed off from that memorandum what we made there.

Q. Describe the character of the material that was in the street and how it was located on the 12th of November, 1879, the night on which you heard an accident occurred.

A. A few days before we had it all shaped together. There was some rubbish close to the gutter—about a couple of feet from the gutter, so the gutter was clear. It laid there—perhaps a couple of loads of brickbats, etc., what was left. We cleaned it all together, and then we started to make some mortar for plastering, and the plastering mortar went clear up to the gutter, except just leaving the gutter open so the water could pass off, and the mortar box was standing from the gutter about four feet. Between the curb-stone and the mortar box was about four feet, and then, I think, in the neighborhood of four feet—about the same space—between the mortar box and the lime box, and then there was the sand screens.

Q. What was the size of the mortar box?

A. I didn't measure exactly. Generally we have them about four by eight feet.

Q. As you recollect that mortar box, what was the size of it—the length, breadth, and depth?

A. I always make them from four to eight feet. I have been doing that for years.

Q. What was the length of that mortar box?

A. Eight feet.

Q. What was the width of that mortar box?

A. About four feet.

Q. What was the depth of that mortar box?

A. About twelve inches.

Q. Which end of it was four feet from the east curb?

A. The four-feet side—the end of the box.

139 Q. Where, with reference to the mortar box, was this sand?

A. On the other end.

Q. Which is the other end? Describe it by points of the compass.

A. The west end. On the west end of the mortar box was the sand laying.

Q. Were there any bricks there?

A. No, sir; not there.

Q. In this pile of building material were there some bricks?

A. No; no bricks. It was only just rubbish, you know—brickbats that was left.

Q. Where, with reference to the mortar box, were the brickbats?

A. It was south from the mortar box about four or five feet or more and was laying in a pile around, you know. There was at least four or five feet between them.

Q. On the south side of the mortar box?

A. Yes, sir.

Q. Then, the distance between the west end of the mortar box and the lime box was how far, as you can remember?

A. The mortar box stood about half way between the lime box and the curb.

Mr. WILCOX: Answer the question.

A. About in the neighborhood of four feet—something like that.

Q. Describe the lime box.

A. The lime box was one of those upright piano boxes.

Q. What was its height?

A. I think in the neighborhood of four or five feet—something like that—and about two foot and a half wide, or something like that, and from four to five feet long—all of five feet long, they are.

Q. What article was farthest west into the street?

A. It was the lime box.

Q. What material of any description was about the lime box?

A. There was the sand the closest to it—the screenings what they had out of the sand—between the lime box and the mortar box, so it was connected with the lime box, on the east side of it.

Q. State whether or not there was any sand on the southerly
140 side of the lime box.

Objected to as leading.

Q. State whether any other material surrounded the lime box.

A. No, sir; there wasn't any.

Q. State what the lime box stood upon.

A. Stood right on the bottom of the pavement.

Q. When did you first learn of the accident?

A. In the evening of that night when the accident happened, about nine o'clock; I think somewheres in the neighborhood of nine o'clock; I don't think it was later.

Q. How did you learn of the accident?

A. When I was just going to bed. I was going to bed early and somebody knocked at the door, and my wife she went out and a little boy called at the door.

Q. What did you do then?

A. I dressed myself again and went down—went right down town on the car.

Q. State in what condition you found the building material at that time.

A. I found it just the same as I left it that night, except the mortar box was moved.

Q. In what manner was the mortar box moved?

A. At night the mortar box was standing square with the street—across the street, you might say—and that night it was moved kind of the other way. The smallest way was turned around—just twisted around to the southeast.

Q. How far had it been moved?

A. Oh, in the neighborhood of four or five feet—twisted around. I could not tell exactly. I believe it was something like four or five feet.

Q. State what light or other signals were there marking the obstruction in the street.

Objected to; objection overruled.

A. There was a light put upon the lime box, and the light
141 shone out plain enough so you could see——

(By the COURT:)

Q. When you went down at nine o'clock?

A. Yes, sir; so I could see plain enough everything that was around there; and the gas-light was lit on the other corner, on the corner of Johnson street.

(By Mr. SHERWOOD:)

Q. Do you know who put the light on the lime box?

A. I did myself.

Q. When?

A. In the evening, about five o'clock.

Q. The same evening?

—. The same evening; yes, sir.

Q. State whether or not the light that you found on the lime box when you visited that place at nine o'clock was the same light that you had placed there at five o'clock before.

A. Yes, sir.

Q. What sort of light did you place on the lime box?

A. It was a white light—a lantern—regular barn lantern, what we call it.

Q. Where did you put it?

A. I put it on the lime box.

Q. How did you fix it?

A. I had a stick all during the progress of the building nailed onto the lime box, all the time, where the lantern was placed.

Q. Where on the lime box was it placed?

A. On the southwest corner of the lime box.

Q. Was any one with you when you put that light up?

A. Yes; there was three or four gentlemen there.

Q. Who were they?

A. There was Mr. Schott, I think—Fred. Schott; he keeps a store there; and the others I can't name them. I know them; they are both in the court here, but I don't know their names.

Q. What sort of night was it when you put the lamp up?

A. When I put up the lamp it was raining hard. It just kind

of slacked up, but still it rained hard for about a quarter
142 of an hour before and afterwards, but it just kind of slacked up when I hanged it up. I think so. It was raining hard. I couldn't get hardly outside to it.

Q. How much above the top of the lime box, if any, did this light hang?

A. I think it was in the neighborhood of three feet.

Q. State whether or not the material in the street could be seen from the reflection of the lights surrounding it?

A. I could see it plain enough that night, and I should think everybody could see it, the way the light shined.

Q. How far was the lamp-post on the corner of Johnson street from this obstruction?

A. Somewhere in the neighborhood of forty feet. I think the time when they measured it it was thirty-eight feet. I won't be exact about it, but still I think it was.

Q. State what evidence of an accident you saw about that obstruction when you visited the place at nine o'clock that evening, if you saw any.

Objected to; objection sustained.

Q. What else did you see, if anything, indicating a collision?

A. I saw a track of a buggy or a wagon; some kind of light wheels, the way it looked; and the way it looked to me they must have dragged the box around. They came alongside the curb and they made a short twist, and they came to the mortar box, and they must have made a short twist again and went around the other way.

Objected to.

Q. Tell us what you saw when you first went down there at nine o'clock.

A. I followed the track, perhaps, some forty feet or something.

Q. Where was that track?

A. Right along the gutter; close to the gutter; about two or three feet off from the gutter, on the east side of Bank street. Then it came up to the mortar box, and it must have struck the
143 corner of the mortar box, and then it went west across the street, and then turned the other way, towards St. Clair street, back again, twisted the mortar box over some three or four feet, and then it led the other way again—the way it came from.

(By the COURT:)

Q. That is, went east?

A. Went east again.

(By Mr. SHERWOOD:)

Q. State where, with reference to that mortar box, the track led.

A. It struck it on the southeast corner, and then it twisted it around so it stood the other way, diagonally across through Bank street. It twisted all the width of the box around.

Q. What was the night?

A. That night, when I was down, it was a clear night that time.
Q. Clear at nine o'clock?
A. Kind of a bright night it was, just that time. It wasn't before in the evening when I went home.
Q. In what direction did you follow the track?
A. I didn't follow it any further.
Q. In what direction did you follow it?
A. I only followed it across the road until I saw it led the other way.
Q. State by the points of the compass which way you followed the track.
A. I followed the track east again towards St. Clair street.

(By Mr. ROBISON:)

Q. Is that east or south?
A. South, I mean.

(By Mr. SHERWOOD:)

Q. Which direction did the track come from?
A. It came from the south and went west, and then it turned across.
Q. What else, if anything, did you see there indicating an accident?

Objected to; objection sustained.

Q. Did you notice anything else?
A. I saw just pretty near opposite the lime box—somewhere in the neighborhood of eight or ten feet south from the lime
144 box—I saw kind of a mass, as if somebody fell out—as if some accident had happened. The mud showed it. The street was very muddy there. Somebody was along with me at that time.
Q. How were you able to see the tracks in the street?
A. From the light there—from the surrounding light around there.
Q. How many tracks did you notice there?
A. Only just this one, specially, there. It was a double track—two wheels.
Q. State what other lights, if any, on the street between St. Clair street and this point you saw. Did you see any?

Mr. WILCOX: Same objection.

A. No; only I saw the light there on the other corner of Johnson St. burning.
Q. Where, with reference to Mr. Rosenfeld's block, is Johnson St.?
A. The sidewalk of the south side of Johnson St. leads about in the neighborhood of ten feet north of Rosenfeld's building, right in front of one store there. There is a double store, and the crossing just leads about opposite the door.
Q. I do not believe I got a correct notion of your description of that.

A. I say the south side of Johnson-St. sidewalk leads about in front of one store in the north side of the building.

Q. Then do you strike Rosenfeld's block about ten feet south of the north line?

A. Yes; about that; ten or twelve feet; something like that.

Q. Where, with reference to that cross-walk, did the lamp-post on the corner of Johnson St. stand?

A. The lamp-post was right on the corner where that crossing is. That time the crossing was different from what it is to-day. The crossing led just about in the center of that lamp-post at the time.

Q. On which side of the crossing was the building material?

A. South of the crossing. It was right up to the crossing,
145 you might say.

Cross-examination by Mr. WILCOX:

Q. What time was it you went down there?

A. I think it was about nine o'clock in the evening.

Q. What makes you think so?

A. Well, I know—it has always been in my mind that way.

Q. What fixed it in your mind that way, originally?

A. Well, I must look to the clock. I came home in the neighborhood of ten o'clock.

Q. Did you look at the clock?

A. I think I did; I am pretty sure of it.

Q. You were just going to bed, were you?

A. Yes; I was going to bed. At night when I came home I was all wet through——

Q. Were you undressed?

A. Yes; I was undressed.

Q. You remember of testifying in this case before, do you not?

A. Yes, sir.

Q. Do you not remember that on that trial you testified that you did not look at the clock?

A. I don't know if I did or not.

Q. What did the boy say to you?

A. I think the boy said that there was a man killed there.

Q. Who sent him?

A. I don't know.

Q. Did you ask him?

A. No, sir; I don't believe——

Q. Who was the boy?

A. I think it was Jake Heintz's boy; that is what I understood.

Q. Did you know at the time who he was?

A. No, sir.

Q. Did you ask him who he was?

A. No, sir.

Q. Did you ask him who sent him?

A. My wife got kind of excited about it——

Q. Did you ask the boy who sent him?

A. No, sir; I don't think I did.

146 Q. Did you ask him any questions?

A. Yes; I asked him if the man was killed. He says, "Yes."
Q. How long after the boy was there did you start down town?
A. Just as soon as I had my clothes on.
Q. How long did it take you to dress?
A. Not long.
Q. How long?
A. About five minutes. I think it didn't take me any longer that night.
Q. That was about five minutes after nine o'clock, then?
A. Well, I couldn't tell——
Q. Or in that neighborhood?
A. In that neighborhood it was.
Q. Where do you live?
A. I live on Hayward street.
Q. Where is Hayward street?
A. It runs off Prospect to Garden, next to Sterling.
Q. Whereabouts on Hayward street do you live?
A. 61.
Q. Whereabouts is that on the street?
A. It is the third house from Cedar—east of Cedar.
Q. How long does it take you to come down from your residence to Bank street?
A. When I came on the corner of Prospect I took the car. I think it takes about fifteen minutes from the corner of Hayward.
Q. Does it not take longer than fifteen minutes?
A. Fifteen or twenty. I don't think it takes any longer than fifteen; about twenty minutes, I guess.
Q. How long did it take you to walk from your house to Prospect street?
A. I don't think over five minutes.
Q. How long did you wait for a car?
A. I didn't wait for a car. I ran for it yet. The car just came.
Q. Where did you get off the car?
A. At the corner of Bank.
Q. How long did it take you to walk down to the place of the accident?
A. It wouldn't take over five minutes.
Q. Was anybody with you?
147 A. My little boy was with me. I didn't know it, only I learned it afterwards, last spring, and he knowed all about it; and he went along with me, and I never thought of it at all.
Q. You testified before you were alone, did you not?
A. I don't know if I did, but I learned that the little boy knowed all about it.
Q. How old was your little boy?
A. He was then eight years.
Q. And you didn't know he was with you?
A. Well, I had never thought——
Q. You didn't know that he was with you at the time?
A. Well, I know it now, and I knowed it then when he told me.
Q. You did not know it then?

A. I didn't think of it then.
Q. Was anybody else with you?
A. In going from home?
Q. Was anybody else with you when you got down to the place?
A. Yes, there was.
Q. Who was it?
A. That is more than I could tell you to-night.
Q. Why can you not tell us?
A. When I got into Schuepbach's place—I went into Schuepbach's place and asked if there was——
Q. You need not state that. I am simply asking who was with you.
A. I couldn't tell you who it was.
Q. Where did you find this man that was with you—this mysterious fellow?
A. In Schuepbach's place.
Q. Then he did not come down with you?
A. No.
Q. What was the first thing you did when you got down there?
A. When I went down there I went right into Schuepbach's place.
Q. Did you not examine the obstruction at all before you went into Schuepbach's place?
A. I looked over the place.
Q. Did you not go out and feel around?
A. Not then, right off. I just overlooked it. When I came up there I went into Schuepbach's and asked what they knew about it.
Q. Who was with you when you were examining those wagon tracks you have been talking about?
A. Well, there was lots of these green Germans in there at the time.
148 Q. I do not ask you who was in the saloon. I ask you who was with you when you were examining these wagon tracks?
A. I couldn't tell who the man was. There was a whole crowd of them came out and stood on the sidewalk.
Q. Was there anybody with you when you were examining those tracks?
A. Yes, I believe there was.
Q. Who was it?
A. I couldn't tell the man's name. I was not acquainted with the men that was in the saloon there.
Q. Were you acquainted with the man that was with you when you were examining the tracks?
A. No, sir; I don't think I was.
Q. Did you ask him who he was?
A. No, sir; I thought Schuepbach knowed him.
Q. Did he help you examine the tracks?
A. Well, we had a look over it.
Q. Did he assist you in examining the tracks?
A. Not assist—nobody assisted me.
Q. What did he do towards looking at the tracks?

A. Nothing. Nobody didn't do anything. There was nothing to be done.
Q. What did you do?
A. I just looked at the thing and that was all.
Q. Did you bend down to the ground?
A. No, sir; I don't think I did.
Q. What do you say, whether you did or not?
A. I say I didn't.
Q. You say you followed those tracks about forty feet?
A. I think I did.
Q. On the east side of the street?
A. On the east side of the street.
Q. And then I understood you to say the tracks turned and went across the street towards the west?
A. Towards the west.
Q. And then turned towards the Kennard House again?
A. Yes, sir.
Q. That is south?
A. Yes, sir.
Q. That's a fact, is it?
A. No; the track came from the south.
Q. Were there any other tracks there except these?
A. So soon as they got away from the mortar box there was other tracks following in there again at that time, and I couldn't follow it any farther.
149 Q. There were other tracks in there, are there?
A. Yes; and then it went off.
Q. What kind of tracks were they?
A. They looked like a buggy-wheel tracks.
Q. Did you measure them?
A. In the neighborhood of an inch and a half, or something like that.

Mr. SHERWOOD: Which tracks are you speaking of?
Mr. WILCOX: The only tracks he has spoken of.

Q. You didn't measure them?
A. A man could see if it was a big cart.
Q. You didn't measure them?
A. No; I didn't measure them.
Q. Did you see any tracks of horses' hoofs?
A. There was a mess right there, close to the lime box.
Q. I did not ask you about that. Did you see any tracks of horses there?
A. Yes, sir.
Q. How many?
A. Oh, quite a lot of them.
Q. How many horses would you judge had been there?
A. I don't know. Maybe it was only one or two, so far as I know.
Q. What kind of pavement was there on Bank street at that time?
A. There was a block pavement there.
Q. Nicholson pavement, was there not?

A. Yes, sir; and the side was stone.

Q. That is, a wood pavement, and the side was stone?

A. Yes, sir; I think that that is the way it was at that time.

Q. The building that was being constructed at that time was on the south side of a building that also belongs to Mr. Rosenfelt, was it not? An old building stood there, did it not, before?

A. No.

Q. Was this the only building that belonged to Rosenfelt?

A. I heard afterwards he bought in the rear of it, but not at the side.

Q. I am talking about the side.

A. No; not what I know.

Q. There is a brick building standing next, is there not?

A. That was built afterwards—the following year.

150 Q. Which way, north or south?

A. North. I think it was built that winter yet.

Q. You did not make any measurement that night at all, did you?

A. No, sir.

Q. How long did you stay there?

A. I did not stay there very long.

Q. Where did you go from there?

A. Went home.

Q. You said you were the contractor who had the job of putting up this building?

A. Yes, sir.

Q. Did you make any further investigation than what you have told us about this accident, or whatever accident happened there?

A. Only what I learned next morning.

Q. You were somewhat interested in the matter, were you not?

A. I should think so. It was my stuff that was on the street.

Q. You are somewhat interested now, in this matter, are you not?

A. Well, I don't know if I am or not.

Q. You have counsel employed here, have you not?

A. Yes, sir.

Q. Did you testify on the other trial that that mortar box was moved?

A. Yes.

Q. Are you sure about that?

A. I think I did.

Q. Will you be positive?

A. I don't know; I think so.

Q. I will ask you if on the other trial you were not asked this question, after stating that you went down there: "Describe what you saw when you went there;" and did you not answer: "I found a lantern burning all right, and that is all I found there, and the material in the same place." Is not that the exact language of your testimony before?

A. Maybe it is so. If it is there, it must be so.

Q. Is your recollection now better than it was then, as to what the facts were?

A. Maybe it never was asked of me, but still I knowed it all the same, that it happened that way, the way I stated now.

Q. Is it not a fact that you sat here at the table and heard
151 other witnesses testify to the moving of the box after having testified?

A. Yes, sir.

Q. And did not that change your notion of things?

A. Oh, no.

Q. Did you say that you made the measurements the next morning?

A. Me and Mr. Uhl did.

Q. Did you make them yourself?

A. We two together.

Q. Did you take the figures?

A. Mr Uhl did.

Q. You did not?

A. No, sir; he made the figures; that is my impression.

Q. Did you measure those things as you found them the next morning?

A. Yes, sir; not the mortar box. We placed it the way it stood there on the plan, but still we measured just how far it stood on the street.

Q. You moved it, did you?

A. We moved it in the same place back again.

Q. How could you tell where it stood if it rained all night?

A. It did not rain all night after that.

Q. How deep was the mud there that night?

A. It was regular slush there.

Q. How deep?

A. I should think about a couple of inches, some places, and some places maybe more. The Nicholson pavement was all mud there.

Q. Was it the rotten Nicholson pavement that you call mud?

A. Yes; it was all slush.

Q. It was that that the wheels went into, was it?

A. Yes, I guess it was.

Redirect examination:

Q. What was in the lime box, if anything?

A. I believe there was not anything in it. It is my impression the mortar was all slacked up.

Q. Was there anything in the mortar box?

A. No, sir.

Q. How much sand was there there?

152 A. There may be a load or something. There was not much there. There was just siftings, about six or seven loads of sand that they got up.

Q. How high was the pile of sand?

A. Oh, it was just alongside—about that high, you know. They throw it out when they sift the sand.

Q. Up against anything?

A. Against the lime box.
Q. On the east side?
A. East side, between the lime box and the mortar box.
Q. What was the condition of the street at the place where you saw the tracks?
A. It was slush—mud, you know. The street was in bad condition, anyhow—the Nicholson pavement was.
Q. State whether or not the lamp was the same as had been hung there on previous nights.

Objected to; objection sustained.

Q. Where did you get the lamp?

Objected to; objection overruled; plaintiff excepted.

A. We got it from Mr. Schott. He bought it——
Q. Who was Mr. Schott?
A. He kept a store at that time in the Howland block, across the road.
Q. Where is the Howland block?
A. About across the road from Schuepbach's place—pretty near opposite Rosenfeld's and Schuepbach's there.
Q. When did you get the lamp from Schott?

Objected to; objection overruled; plaintiff excepted.

A. That evening, about near to five o'clock—quarter to five; something like that.
Q. Where were you when you got it from Schott?
A. He went across the road and bought it and handed it over to me.
153 Q. How did you happen to go to Schott for a lamp?
A. That evening I went to hang up the lantern and I could not find it, and it just started in heavy rain, and I ran over in Mr. Schott's store and asked Mr. Schott if he had a lantern. He said, "No, I ain't." "Well," said I, "gosh, I want a lantern somewhere." "Well," says he, "I will go across the road and buy you one. I can buy it, perhaps, a little cheaper than you can." There was a crockery store on the other side of the street, on Bank street, and he bought it there and gave it to me. He went and bought a lantern across the road and handed it over to me, and I paid him sixty cents, I think it was, and we filled it, I think, in his store, that evening; I think we did. Then, after we had it filled, there was a couple of more fellows in Schott's place, and he was just ready to close up and go home, and they went across the road with me and saw me hang it up and stayed there while I was hanging it up. That is the way the whole thing was done.

Recross-examination:

Q. How are you able to swear that that was the same night?
A. I should think any man could swear to it.
Q. Is that the only reason you can give for it?
A. I think that is about the only reason. I know that night there

was the accident, and I should think I would never forget the accident.

Q. You said in answer to Mr. Sherwood that you thought the lime had all been slacked up that night and there was very little in the lime box; is that a fact?

A. I don't think there was, I said.

Q. How much lime and mortar did it require to plaster that building?

A. There was only very little plastering in that building.

Q. Answer the question.

A. That whole building, you mean?

Q. Yes.

A. We did not plaster the whole building.

Q. What you did plaster?

154 A. We only had about twenty-five bushels of lime slacked.

Q. How much do you slack at once?

A. The box will hold about five bushels.

Q. How often do you slack it?

A. Only slack it once.

Q. I do not mean how often you slack the same lime, but how frequently do you slack it?

A. Why, so quick as they get a box mixed, and then slack again.

Q. Tell us how long that would be.

A. It takes perhaps an hour to slack a big box of mortar.

Q. How long a space between the times when you slack lime to make up mortar?

A. They slack it up so quick as they get the box empty; they put it in again.

Q. How long does it take to get it empty?

A. Well, one man, it takes him about an hour to make a box of mortar; all of that.

Q. How long does it take to use that up?

A. That all depends how many men is working at it.

Q. How long did it take on this job?

A. You understand, this mortar after it was slacked was put on a pile and stood there.

Q. How long did it stay there?

A. We didn't use it at all. We piled it up.

Q. Had you not used any at all?

A. Not of that mortar.

Q. You said you had about twenty-five bushels of lime there?

A. Yes, sir.

Q. And you slacked about five bushels at a time?

A. Yes, sir.

Q. Before this night when did you last slack lime and make mortar?

A. It was, I think, about two days before when this mortar was made up—all in one day.

Q. Before that time when did you have a slacking?

A. We wasn't working there for some time, you know; we was thro' with all the mason-work.

155 Q. About how many days?

A. I think we was not working there for a couple of weeks before, except two days before. There was laborers cleaning up, and so on—cleaning out the cellar.

Q. Then it was about two weeks before that time when you made the last batch before?

A. Yes, when we got through mixing the mortar.

Q. Prior to that time when did you make the last batch?

A. We were making there for a couple of months, every day, right along.

Q. You did not have but one mortar box, did you?

A. That is all we had there.

Q. And one lime box?

A. Yes.

Q. This same lime box and same mortar box?

A. Yes.

Q. All the time?

A. All the time.

Q. Do you remember where you filled that lantern?

A. I think it was in Schott's store.

Q. What did you think about it on the other trial? Do you remember?

A. No, I don't.

Q. Don't you remember that you testified on the other trial that you went out and got the oil in another place and filled it yourself?

A. We always kept the oil in the cellar.

Q. Did you not so testify before?

A. I don't believe I did. I think we had an oil jug. We had it in a two-gallon jug; something like that. We had it in the basement there, and I went and got the oil.

Q. What kind of light had you there previous to this night?

A. We had red lights there all the time.

Q. What kind of a light was this you claim you put up there?

A. White.

Q. Why didn't you put up a red one?

A. I could not find it that night.

Q. You usually put up red lights, do you?

A. Yes, sir; all the time.

156 Q. Is that your habit, to use red lights or such things in buildings?

A. Yes, sir.

Q. You said, in answer to Mr. Sherwood, that the mud, as you called it, was slush?

A. Yes, it was.

Q. That means it was soft?

A. Soft.

Testimony of Frederick Schott.

FREDERICK SCHOTT, called by defendants, being sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. What is your business?

A. Bottled supplies.

Q. Where is your place of business?

A. 133 Bank.

Q. Where were you in business and what was your business in November, 1879?

A. In the same business, but across the street, at 61 then. The numbers have been changed since then.

Q. Where, with reference to the building of Mr. Rosenfelt, on Bank street, was your place of business in November, 1879?

A. He was 57, I think, and I was across the street, 61,

Q. How far was your place of business from Johnson street?

A. I think about forty or fifty feet. I was in the corner block.

Q. Whose block was it?

A. Waring's block it was called then.

Q. Who occupies that building now?

A. Hurlbut.

Q. Was Waring's block the whole corner there?

A. Yes, sir; there was three stores in it.

Q. Do you remember an accident that occurred in front of Mr. Rosenfelt's building on the evening of the 12th of November, 1879?

A. Yes, sir.

Q. When did you first hear of it?

A. The next morning.

Q. What do you know as to there being any building material or obstruction in the street in front of Mr. Rosenfelt's on that day?

A. There was a lime box, I think, and a mortar box, and some sand, as near as I can remember.

Q. State whether or not you had seen them on the day of the accident.

157 A. Yes, sir; I seen them that day.

Q. How much of that street was occupied?

A. I should think about one-third.

Q. State, if you know, whether or not any lights were placed upon any part of those obstructions in the evening of the 12th of November, the evening of the accident.

A. I helped fill the light and saw it put up the night before the accident, and bought the lamp the same day.

Q. What sort of a light was put up there?

A. A lantern.

Q. What kind of a lantern?

A. I believe they call them tubular lanterns; I don't know.

Q. That is, round?

A. Yes, sir.

Q. A railroad lantern?

A. No, sir.

Q. Where was the light placed?

A. On the lime box.

Q. What part of the lime box?

A. On the outside, as near as I can recollect.
Q. How was it attached to the lime box?
A. A stick nailed to the lime box and hung on the stick.
Q. At what time was this light placed there?
A. I generally go home before six, and it was before that hour it was put there.
Q. Were you there when the light was put up?
A. I seen the lantern hung there; yes, sir.
Q. Who put it there?
A. I think Mr. Kostering.
Q. Was any one else there at the time?
A. I don't remember.
Q. What kind of a night was it, do you remember?
A. No, sir.
Q. State whether or not the material could be seen from the light reflected by this lantern.
A. Certainly it could be seen.
Q. How far could that lantern be seen by one going north on Bank street?
A. I should think you could see it from St. Clair street; I could.
Q. How far above the top of the lime box did this lamp hang?
158 A. A foot or two.

Cross-examination by Mr. WILCOX:

Q. Whom have you talked with about this case?
A. I have not talked with anybody since this last suit; have not heard of it since, until this morning at eleven o'clock, was the first that I heard it was going on.
Q. Whom had you talked with about it at the time of the last suit?
A. I heard about it in Rosenfelt's.
Q. Whom did you talk with?
A. Mr. Rosenfelt and that gentleman there (Mr. Sherwood).
Q. Anybody else?
A. I don't remember whether I have or not.
Q. Did not talk with Mr. Armstrong about it.
A. I might have.
Q. Did you?
A. I don't remember whether I did or not.
Q. When did you talk with Mr. Sherwood about it?
A. He came in my store before the last suit.
Q. Just previous to the last suit?
A. Yes.
Q. That was about a year ago?
A. I guess so; I don't know how long ago it was.
Q. Did you talk with anybody prior to that about it?
A. I don't know whether I did or not.
Q. Don't you remember?
A. No, sir.
Q. When was your attention first called to this matter?

A. When Mr. Rosenfelt told me he guessed there was going to be a lawsuit about this case.

Q. That was about seven months after the accident, was it not?

A. I don't know; it might have been.

Q. About the time the lawsuit was begun?

A. I suppose so; I don't know.

Q. You say that you guess about a third of the street was occupied by material on that day?

A. Yes, sir.

Q. You did not measure it, did you?

A. No, sir.

Q. There was nothing to call your attention to it, was there?

159 A. Nothing, only I saw teams passing by the stuff.

Q. Did you see it every day?

A. Every day.

Q. How long?

A. Might have been three weeks; might have been six weeks; I don't know.

Q. Was it more than three?

A. I say it might have been three, and might have been six.

Q. But you saw it every day there?

A. I saw it every day I was down there; yes, sir.

Q. You were there every day, were you not?

A. I might have been away some days. I get out of town some days.

Q. As a rule, you were there every day?

A. Yes, sir.

Q. And, as a rule, you saw that material there every day, did you?

A. Yes, sir.

Q. Was it the same kind of material that you saw this day?

A. No, sir; there was sand and the box and the mortar box. The brick was pretty much cleared away.

Q. When you say "box" you mean the lime box?

A. Yes, sir.

Q. The lime box and mortar box were there all the time?

A. Yes.

Q. But you did not take any measurements whatever?

A. No; I did not take any measurements.

Q. On which side of that lime box do you say that light was hung?

A. On the outside, as near as I can recollect. I think it was on the west corner.

Q. The corner that you would first come to coming from the lake?

A. No, sir; coming the other way.

(By Mr. ROBISON:)

Q. Southwest corner?

A. Southwest corner.

(By Mr. WILCOX:)

Q. Then it was not on the side of the box, was it, as you testified?

A. It was on the corner of the box, I said.

Q. Are you sure that it was on that corner?

A. As near as I can recollect.

160 Q. What time did you say you closed up?

A. Closed up before six o'clock.

Q. You did that every night, did you not, as a rule?

A. Generally, yes.

Redirect examination:

Q. Was there not room for wagons and vehicles to get through on the west side of the street without difficulty?

A. Yes, sir.

Testimony of Christian Schuepbach.

CHRISTIAN SCHUEPBACH, being sworn, testified:

(By Mr. ROBISON:)

Q. You live on Bank street, in the city?

A. Yes, sir.

Q. State whether you lived there in 1879.

A. Yes, sir, and since.

Q. Where do you live with reference to Rosenfelt's block?

A. Joining there.

Q. On which side?

A. The south side. Rosenfelt's is north from my place.

Q. State whether you know anything about an accident that occurred in front of Rosenfelt's at the time they were building there.

A. Yes, sir.

Q. What do you know about it?

A. We was in the house and somebody hollered, and then we went out.

Q. What business were you in?

A. We keep boarding-house and hotel—lodging.

Q. You say somebody did what?

A. Somebody hollered outside, there was an accident, and I went out.

Q. About what time was that?

A. That was after supper, about between seven and eight, I guess.

Q. What did you see out there when you went out?

A. I saw a buggy drove off just when I came out; one man jumped right in the buggy and they drove off.

Q. Did you see anybody that was hurt there?

A. No.

Q. Do you say the buggy was going off or standing there?

A. Just when we went out a man jumped in and they drove off.

Q. One horse or two?

A. Two horses.

161 Q. Which way were the horses facing?
A. South, a little southwest.
Q. State what you did when you were out there, if anything.
A. I went out in the street; I saw the tracks.
Q. You made an examination, some of you?
A. A little, not much.
Q. You saw tracks of what?
A. Tracks of a buggy.
Q. State what there was out there in the way of materials, or mortar box, or lime box, or anything of that kind.
A. There was sand, a mortar box, and a lime box there.
Q. Where were these tracks with reference to the mortar box?
A. They made a curve right there. They came on the east side—they came down and curved.
Q. On the east side of the street?
A. Yes.
Q. Did they curve before they got to the mortar box?
A. I suppose the horse was right close to it.
Q. State whether the tracks led to the mortar box.
A. Yes; it must have struck; the mortar box was moved a little bit.
Q. Whereabouts on the box did that track strike the mortar box?
A. On the corner—the east corner. It turned round as tho' it struck on the corner of the box.
Q. The corner towards the sidewalk or the other corner?
A. The corner towards the sidewalk.
Q. State whether you noticed whether the mortar box had been moved.
A. One end was moved a little.
Q. What kind of an evening was that—whether it was rainy or clear?
A. It was not raining at that time, but it did before; it was wet. It rained during the day; it was wet.
Q. State whether you saw anything upon the ground there that attracted your attention.
A. We saw kind of a muss; the mud was not deep.
Q. What do you mean by "a muss?"
162 A. Well, that something happened there.
Q. State whether you saw that in the wet mud or otherwise.
A. In the mud. It was raining before, and so it was a little mash; that was all.
Q. When you went out there and saw the buggy, where was the buggy with reference to the mortar box?
A. Oh, it was off a little.
Q. A little off of the mortar box?
A. Yes.
Q. State what sort of a buggy it was.
A. A large top buggy, with the top down.
Q. How near to the curb on the east side of the street were these buggy tracks?

A. They came down, I guess, about five or six feet, to the east end of the curb.

Q. Describe the track.

A. I saw it made a curve in front of my house. It must have come down——

Q. State whether you saw the track before it started to curve.

A. We could see the track around this curb-stone, and then right in front of my house it made a curve.

Q. When it came up there how near did it run to the east curb-stone?

A. You mean when it came straight?

Q. When it came straight up there.

A. About five or six feet.

Q. Whereabouts was this muss, as you call it, with reference to the mortar box?

A. It was a little south from the mortar box—southwest.

Q. About how far from the mortar box?

A. I did not measure it. I could not say exactly. I did not measure anything.

Q. State whether you saw any light about there.

A. Yes, sir.

Q. Where was the light?

163 A. The light was on the southwest corner of this muss, then—that is, of this mud box and lime box there. It was on the lime box.

Q. On the southwest corner of the lime box?

A. Yes.

Q. What sort of a box was that?

A. It was a common old box, about two feet and a half high. I did not measure it.

Q. How was this light fastened onto that box?

A. There was a stick nailed on, and the lamp was hanging on.

Q. State what other lights, if any, you saw there or about there.

A. There was a lamp right across—that is, a little more west—right on the corner of Johnson street.

Q. What sort of a light was that?

A. That was a gas-light there.

Q. Street lamp?

A. Yes.

Q. How far was that from this lime box?

A. About forty feet, I guess—forty-five feet.

Q. State whether you saw any other lights about there.

A. I had some lights in my front.

Q. What lights did you have in your front?

A. I had a gas-light in each window. It has two burners, but there was only one lighted in each window.

Q. Four burners in all?

A. Yes; I only had two lights there.

Q. State if there is a saloon near that place.

A. Across the street—my own and that across the street.

Q. State whether you noticed or knew of any other light near there that evening.

A. That light on the lime box.

Q. Were those lights that you had inside or outside?

A. Inside.

Q. State whether you had any lights outside.

A. No.

Q. I will ask you whether it was light so you could see in the street or whether it was not.

A. There was lots of light right there.

Q. State whether you could see in the street.

A. You could see there.

164 Q. State whether you could see this lime box and this mortar box and the material down there.

A. Oh, yes; we could see it good.

Q. State whether these lights in your window and that gas lamp and these other lights about there lighted out as far as this mortar box and lime box.

A. Yes, sir.

Q. What sort of windows were in front of your place, large or small windows?

A. They are large windows, but the glasses are about 24 x 30, I guess.

Q. How far did the light shine out from your windows?

A. We could see the track well.

Q. Take the gas-lamp. State how bright that light was there over the street.

A. It was good. It was spread right in the street. You could see it just as plain as can be.

Q. When you came out of your house how far were you from the buggy—I mean how far was your door from the buggy when you came out?

A. I believe from the door of the house it was about sixty feet.

Q. State whether from there you could see the buggy plainly.

A. We did not have hardly time; it just went off.

Q. But could you see objects plainly out there from where you were?

A. We could see them plain—that is——

Q. If it was standing still you could see it plainly?

A. Yes, sir.

Q. But it went off quickly?

A. Yes, sir; went off.

Q. From where you stood in your door when you came out, state whether you could see this building material, the lime box and the mortar box.

A. We could.

Cross-examination by Mr. WILCOX:

Q. You say it was very light there?

A. As good as you can expect.

Q. Was there a sort of an illumination that night?

A. Yes; there was good lights.

165 Q. You say the buggy that you saw was about sixty feet from your door?

A. Just about.

Q. And your door was exactly opposite this obstruction?

A. Yes; just about. The horses was just turned a little south-southwest.

Q. You are on the east side of the street?

A. On the east side of the street.

Q. How wide is the sidewalk?

A. Twenty feet, I believe. I did not measure it, but I believe so.

Q. Then the buggy was forty feet from the east curb, was it?

A. Just about.

Q. By the way, what did you say your business was?

A. I keep hotel and boarding-house and a little saloon—everything like a hotel.

Q. You have a bar?

A. Have a bar.

Q. And do you have little beer tables?

A. Some tables in for taking lunch, and so on.

Q. What were you doing when you got this information of the accident?

A. Was sitting by the table there.

Q. In the saloon?

A. Yes.

Q. Were you drinking beer?

A. No, sir.

Q. Did you not testify on the other trial that you were behind the bar?

A. No; I don't think so.

Q. Did you not testify before that some gentlemen came in and told you that there had been an accident?

A. I said somebody hollered.

Q. How many were there in the saloon at that time?

A. I could not tell you exactly.

Q. About how many?

A. There was a few there, but I could not tell you exactly.

Q. About how many?

A. I remember two.

Q. Who were they?

A. Kohli and Hilderbrand.

166 Q. Anybody else?

A. There was some more there, but I did not know them.

Q. If it was so light there as you describe, could you not see what was going on out in the street from the inside of your saloon?

A. No.

Q. Why not?

A. Because I got shutters.

Q. Could you not see right through your windows and see all that was going on?

A. No; the shutters was too high; can't see out a——

Q. What kind of windows have you there?
A. Large windows.
Q. What kind of glass?
A. I guess the glasses are 24 x 30—ordinary glass.
Q. What kind of glass was it?
A. Window glass, the same as is there yet.
Q. Was it clear glass?
A. It was pretty clear; yes.
Q. Was it painted?
A. No.
Q. Was it frosted?
A. No; nothing.
Q. When you went out of the saloon what was the first thing you saw and what was the first thing you did?
A. The first thing I saw I saw a buggy and a man jump right in and drive off quick.
Q. How many men were in the buggy?
—. Just two.
Q. What kind of looking men were they?
A. I could not tell; they did not face me.
Q. What kind of a looking man was it you saw get into the buggy?
A. You see they went so fast I hardly noticed.
Q. You could see so plainly; what kind of men were they?
A. Pretty stout men—that is, not very tall, but pretty stout.
Q. He jumped into the buggy, did he, and drove off?
A. Drove off.
Q. And you could see the other man in the buggy?
A. I could see the back; I could not see the face.
167 Q. What kind of a hat did the man have on?
A. I did not notice. I believe a soft hat.
Q. You could see, could you not?
A. I could see, but I was looking then on the street more.
Q. What kind of horses were they?
A. I don't know.
Q. Why don't you know?
A. I didn't notice.
Q. You were looking right at them, were you not?
A. Yes; but I could not swear to them, and what I can't swear I don't say.
Q. Did you see any other buggy there that night?
A. No.
Q. Was one of the horses a white horse?
A. I don't know.
Q. Would you know if it had been a white horse?
A. I don't know.
Q. You could not see, could you?
A. Oh, yes; we could if we had noticed, but I forgot it.
Q. You have forgotten it now?
A. I am not sure of it.
Q. How much mortar was there in that mortar box?
A. There was not much in it.

Q. How do you know?
A. We was looking where the mud box was moved a little.
Q. How far was it moved?
A. In the corner about a foot. That is where it was moved the most.
Q. How do you know that?
A. We was looking at it.
Q. How could you tell that it had been moved at all?
A. You could see on the ground.
Q. How did it look?
A. Well, you know how it looks when a mud box is moved in the mud. You could see the marks.
Q. It was not very wet then, was it?
A. No. Well, it was a little wet.
Q. It had been raining pretty hard, had it not?
168 A. Not at present, not that time, but it rained before, I suppose.
Q. Was it not sloppy?
A. Well, it was wet.
Q. Was it not all sloppy?
A. No.
Q. Had you noticed the lights there on that obstruction before this, on other nights?
A. Yes, sir.
Q. Every night?
A. Every night.
Q. You had noticed it every night, had you?
A. Once, I believe, it was away there.
Q. When was that?
A. I don't know.
Q. Do you remember there was a night there was no light there?
A. No, no; there was every night a light there. Once the wind blowed it out, and they lighted it again—the watchman.
Q. When was that?
A. Oh, that was long before.
Q. What kind of lights did they have there usually?
A. A lamp.
Q. What kind of a lamp?
A. A railroad lamp. I don't know what they call it—street lamp.
Q. Same kind of light they had this night?
A. No; I believe it was not the same lamp.
Q. But was it the same kind of a lamp?
A. The same kind of a lamp.
Q. What color was this lamp—white glass?
A. Yes, sir.
Q. And that was the same they had there every night, was it?
A. No; they had a red one first.
Q. When did they have the red one?
A. When the material was there in the street.
Q. When was the red one there?

A. It was there for a long time.
Q. How long?
A. I don't know. I can't tell no time.

(By the COURT:)

Q. Do you know what time it was put up that night?
A. No; I don't know exactly, but it was burning when we came out there.

(By Mr. WILCOX:)

169 Q. You went out and looked at these tracks, did you?
A. Yes, sir.
Q. How close did you go to the tracks?
A. We went right over the track.
Q. Who was with you?
A. Kohli.
Q. How did you look at the tracks; did you get down close to the ground?
A. No; we did not; not to stoop down.
Q. Did not have to stoop down; you could see them?
A. Oh, no.
Q. Tell us how large those tracks were.
A. I did not measure it. I guess a regular buggy-wheel tracks.
Q. About how wide were they?
A. I did not measure.
Q. Did you see Mr. Kostering that night?
A. I don't know.
Q. Why don't you know?
A. I don't remember.
Q. Would you remember if you had seen him?
A. I don't know.
Q. You know Mr. Kostering, don't you?
A. I do.
Q. Don't you know whether you saw him that night or not?
A. No; I don't know.
Q. Was he there when you looked at these tracks?
A. No, sir.
Q. Did he come into your saloon that night?
A. I could not swear to that.
Q. Don't you remember anything about it?
A. I guess he was there. I could not swear.

(By Mr. SHERWOOD:)

Q. Did the mortar box stand on sand? Was there sand below it?
A. A little.
Q. Did you see the marks of the moving of the box in the sand?
A. Yes, sir.

Testimony of Emanuel Rosenfeld.

EMANUEL ROSENFELT, called by defendant, testified as follows:

(By Mr. SHERWOOD:)

Q. When did you first learn of the accident that occurred in front of your store?

A. The next morning.

Q. Did you make any investigation at the time to see how
170 the accident happened and its cause?

A. I went down about nine o'clock, to the best of my recollection, the next morning after the accident.

Q. Did you make an investigation that morning?

A. Yes, sir, we seen the tracks of the wheels.

Q. What did you notice as to the location of the material and how far it extended into the street?

Objected to; objection overruled.

A. The mortar box, to the best of my recollection, was from ten to twelve feet away from the east curb, and was a little out of position by being struck by something.

Last part of answer objected to by plaintiff. Objection overruled.

Q. How far did the entire building material extend out into the street?

A. I suppose about from twenty to twenty-five feet.

Q. What was the nature of the building material there?

A. Sand, bricks, a mortar box, and a lime box.

Q. What were the respective locations of each?

A. From the east curb was sand and bricks and then the box, then some more sand—only a little bit—and then the lime box.

Q. On what did the lime box rest?

A. I suppose it stood right there on some rubbish or something.

Q. On the pavement?

A. There was no pavement there at that time. To the best of my recollection, the street was not paved at that time.

Q. Was it not paved with the Nicholson pavement?

A. They had taken it up.

Q. That is your present recollection, is it?

A. The Nicholson pavement was taken up later. I remember now.

171 Q. What is the size of your lot?

A. 41 feet by 95.

Q. How much of that lot did the building cover?

A. The 41 feet in width and 95 in depth.

Q. What was located on either side of your building lot?

A. On one side was a small frame building, and on the other side was Mr. Schuepbach's place—on the south side.

Q. What place had you to put the building material?

A. We had the privilege of Mr. Taylor, Baldwin's agent, to use

the lot next to ours to drive in and do whatever we wanted to do and use that.

Q. Then you did not use the street?

A. No; for some part of it; but we did not have any building material there of any account at the time.

Objected to.

(By the COURT:)

Q. There was no material put there till the brick-work was built? You took the stone in the cellar, as I understand it, and built up your wall there?

A. Yes, sir.

(By Mr. SHERWOOD:)

Q. And you had the use of this adjoining lot to drive in and out?

A. Yes.

Q. You put your building material in the street, or the building material was put in the street there, was it?

A. Yes; most of it—the brick.

Q. State whether or not more of the street was used than was necessary?

Objected to; objection sustained.

Q. What was the size of the building?

A. 41 x 95 and four stories high, and a basement besides.

Q. Brick block?

A. Yes, sir.

Cross-examination by Mr. WILCOX:

Q. The outside of the building was all put up before this date, was it not?

A. Yes.

Q. So that there was no necessity, so far as the building of
172 the walls was concerned, at that time to use any portion of the street?

A. No, sir; not for the walls, except for the plastering.

Q. I will ask you if you did not testify on the other trial of this case, when asked if you took notice the next morning what distance the material was out in the street, that you did not?

A I don't know what I testified before, but I could not help but take notice.

Q. I will ask you if this question was not put to you, "State whether you took notice of that fact," and if you did not answer, "Not at that time?"

A. I am sure I went down there at that time, after I heard of the accident.

Q. Did you not so testify before?

A. Well, it might have slipped my memory; it had been five years previous.

Q. Was it not after that time that you looked after the matter more closely as to how much of the roadway you were taking up?

A. Not after the day after the accident happened. I looked at it the day after the accident happened, to the best of my recollection; not afterwards.

Q. Was it not some days, some months, perhaps, or a long time after the accident, that you watched the thing more closely, so that you would know how much of the street you were taking up?

A. No; I did not do that. I did not pay much attention to it, except after the accident.

Q. How wide was the pile of sand that you speak of there? How much space did the sand take up?

A. Not very much. I noticed one thing, that the man that furnished the sand came every day with sand.

Q. I do not care about that. At this time when you saw this pile of sand how much space did it take up on the pavement?

A. There was not much there.

173 Q. How many loads were there?

A. I don't know how much rubbish was there. As far as the sand is concerned, there cannot have been very much there.

Q. How much sand was there?

A. There might be three or four wagon-loads.

Q. When that was put out on the ground it would spread out, would it not?

A. They piled it against the mortar box, and it was a pretty good sized mortar box, so that it would pile up pretty well.

Q. How large a pile of brick and rubbish was there?

A. There was not much of that left.

Q. How much; about how big a pile?

A. That is more than I can tell.

Q. Estimate it by loads.

A. There may be six or eight loads.

Q. Of brick there?

A. Yes.

Q. How much space should you think they would take up on the ground?

A. Not very much.

Q. How long was that mortar box?

A. The mortar box, I suppose, was about eight feet long.

Q. And you say it stood twelve feet from the east curb?

A. Yes, sir. The mortar box was either four or five feet this way (indicating) and eight feet or so lengthways, and the long side stood from south to north, to the best of my recollection.

Q. How much space was there between the lime box and the mortar box?

A. It could not be very much, because it was very close. I could not tell you that positively.

Q. Was it ten feet?

A. No, it could not be, because they always took the lime out of the lime box and used it for making mortar.

Q. Was it eight feet?

A. I don't hardly think it was. It might be five.

174 Q. How large was the lime box?

A. About three feet wide, I suppose.
Q. And how long?
A. About six or eight feet long.
Q. Was the sand outside the lime box?
A. I don't know. The lime box, I think, was at the extreme part of the building material.
Q. You think the lime box was the extreme obstruction?
A. Yes.
Q. And was the sand between the mortar box and the lime box?
A. Yes, to the best of my recollection.

Testimony of James Reily.

JAMES RIELY, called on behalf of the defendant, being sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. Where do you live?
A. 19 Rose alley.
Q. Where did you live in November, 1879?
A. 19 Rose alley.
Q. Where is that, with reference to the junction of Johnson and Bank street?
A. It is between Bank and Water from Lake street.
Q. Do you know where Mr. Rosenfeld's block is on Bank street?
A. I do; yes, sir.
Q. Do you remember when they were building it in the fall of 1879?
A. I do; yes, sir.
Q. Do you remember the occurrence of an accident in front of that block in 1879?
A. I do.
Q. Do you remember where you were on the evening of that day?
A. I do; yes, sir.
Q. Where were you?
A. I was at Mr. Schott's in the evening and most all the afternoon.
Q. Do you remember whether there was any building material in the street in front of Rosenfeld's block?
A. There was some; yes, sir.
Q. Do you know what it consisted of?
A. Yes, sir.
Q. What was it, as near as you can remember?
A. Mortar box and sand, lime box, and broken brick.
Q. Which was the furthest west, out in the street?
175 A. The lime box.
Q. Did you notice this material on the evening of November 12th, the evening of the accident?
A. I did; I saw it there right along.
Q. State what you know, if anything, of any lights upon or about that building material.
A. I saw a light there.

Q. When?

(Mr. WILCOX:) What time?
(Mr. SHERWOOD:) Any time prior to nine o'clock?

A. I saw a light there about half past five to six and about seven and about ten.

Q. What light was it that you saw there?

A. A lantern.

Q. Where was it?

A. It was there on that mortar box—lime box, I should say. It was on one of them boxes, hanging on it.

Q. What sort of a lantern was it?

A. Well, I could not tell you exactly. It was a white light.

Q. Where were you when you first saw it?

A. When I first saw it I was in Mr. Schott's store. Mr. Schott went and brought a lantern for a man, and they filled it in there and took it out and hung it on a box.

Q. Did you see them hang it up?

A. I did; yes, sir.

Q. When next did you see the lantern on the box?

A. When I was going to supper.

Q. What time was that?

A. About a quarter of an hour afterwards—about a quarter to six.

Q. When next, if at all, did you see it?

A. I seen it about seven o'clock; I was coming back from supper, going up street.

Q. When did you hear of the accident, if at all?

A. It must have been half past ten when I heard of the accident, when I came back down street.

Q. Where were you when you heard of the accident?

A. Coming down on Bank street.

176 Q. What direction?

A. Coming down towards home, coming down from towards Superior street.

Q. When next did you see the light?

A. I seen the light when I was going, on the way down.

Q. On the way home?

A. Yes, sir.

Q. State where the light was located at each of the times that you saw it.

A. Oh, it was on one of those boxes; I could not state which box; I didn't pay much attention to it; hanging on one of them—a box in the street. There was a mortar box and a lime box there.

Q. State whether or not it was on the same box at all times you saw it.

A. Yes, sir; on the same box.

Q. State, if you can, how far this mortar box extended into the street.

A. Well, I don't know exactly how far it extended. I should

judge about twenty feet—twenty-five feet, probably; I could not state just exactly. I didn't pay much particular attention to it.

Q. What other lights, if any, did you see in the neighborhood of this building material?

A. Well, there is a saloon right opposite; there was a light there.

Q. On what side of the street?

A. On the right-hand side as you go down—on the east side.

Q. Where is that located with reference to Mr. Rosenfeld's block?

A. Right next door to it—right south of it.

Q. How were the lights located in that place?

A. The windows were illuminated—lit up; the gas burning there the same as there is every night.

Q. Where were the gas-jets located?

A. In the windows.

Q. State, if you can, how far the light from those windows reflected out into the street.

177 A. Well, that I could not state. They reflected out over the sidewalk, out as far as the curb-stone. An ordinary gas-light in the front window.

Q. What other lights, if any, were there in the neighborhood?

A. Well, there are lamps right on the corner on the opposite side of the street.

Q. Can you state how far the light from that lamp-post was reflected?

A. I should think that would reflect out to the obstruction, the mortar box and the lime box, half way across the road or more.

Mr. WILCOX: You say you think?

The WITNESS: Yes, sir.

Mr. WILCOX: He calls for your knowledge if you have any.

The WITNESS: My knowledge would be that it was.

Mr SHERWOOD: You may state whether the obstruction could be readily seen in the street there.

A. Yes, sir; I think it could.

Q. How far away could that obstruction be seen?

Objected to.

A. I should think I could see it a hundred feet away.

Cross-examination by Mr. WILCOX:

Q. What was your business?

A. I was not doing nothing at that time, sir.

Q. Were you in Schuepbach's saloon that night?

A. No, sir; I was not.

Q. Didn't you get your information as to the accident there?

A. No, sir; I did not.

Q. Where were you when you heard of the accident?

A. I was coming down home—down Bank street.

Q. Where were you on Bank street?

A. Down pretty near—about the corner of Lake.

Q. Do you remember who it was told you?

A. No, sir; I do not. I didn't pay much attention to it.

Q. What time do you say it was when you learned of it?
178 A. It was about half past ten.
Q. Do you remember testifying upon this trial before?
A. Yes, sir.
Q. Do you remember what you testified to?
A. I testified that I learned about it between ten and half past, I think.
Q. I will ask you if this question was not put to you, "What time in the evening was it when you heard of it?"
A. Yes, sir.
Q. And did you not answer, "Along about a quarter of eight or eight o'clock?"
A. No, sir; I don't believe I did.
Q. Will you swear you did not testify in that language?
A. Yes, sir; I will be willing to swear to that.
Q. How far did you say to Mr. Sherwood that the obstruction extended out in the street?
A. About twenty to twenty-five feet.
Q. Do you remember what you testified to upon that point at the other trial?
A. I think I testified the same.
Q. Will you swear that you did?
A. Yes, sir—well, I would not swear I did. It may have been twenty or twenty-five feet.
Q. Is it not a fact you said twelve or fifteen feet? Is not that your exact language?
A. No, sir; I don't believe it is.
Q. Will you swear that was not your language?
A. Yes, sir; I believe I will.
Q. Will you?
A. I will; yes, sir. I don't believe I made that remark—twelve or fifteen feet.
Q. You did not take any particular notice of it, did you, on that night?
A. Nothing particular; no, sir.
Q. You don't know whether the light that you speak of was hanging upon the mortar box or lime box?
A. No, sir; I am not positive.
Q. How do you know it was in the same place when you saw it at half past ten that it was at six o'clock?
179 A. I don't suppose anybody would change it at that time.
Q. We are not asking you about your supposition. You testified it was in the same place.
A. It appeared to me it was. I know it was hanging on one of them boxes. I could not say which of them. I know there was a light there.
Q. You would not say which box it was on at six o'clock?
A. No, sir.
Q. You would not say which box it was on at ten o'clock?
A. No, sir; I would not.

Q. You can't say absolutely and positively that it was on the same box?

A. No, sir; I don't. I said that.

Q. You say you could see it how far?

A. I should say a hundred feet.

Q. What did you testify at the other trial on that point?

A. I don't know, I am sure, what I did say.

Q. Have you any recollection what you did testify to on that point?

A. No, sir; I have not.

Q. I will ask you if this question was put to you, "How far away could you see the material?" and if you did not answer, "I suppose you could see it away fifty or sixty feet?"

A. I may have said that.

Q. Is your recollection better now than it was then?

A. Not a bit.

Q. But you increase all these distances?

A. It is no benefit to me to increase anything.

A. I didn't ask you about any benefit, but I ask you, as a matter of fact, if you have not increased the distances in your testimony over what you made it at the last trial, in every instance?

A. No, sir; I do not.

Q. Had you been in the habit of seeing that material there?

A. I had; yes, sir.

Q. Every day?

A. Which material do you refer to?

180 Q. Along at the time of the accident or near the time?

A. I seen the material there, yes; while they were building there.

Q. Every day?

Objected to.

(By the COURT:)

Q. Did you look at it any other night?

A. I have seen it there; yes, sir.

(By Mr. WILCOX:)

Q. Near about that time?

A. Yes, sir.

Q. How many nights did you see that material there?

A. I could not tell you how many nights I seen it. I took no memorandum of it.

Q. About how many?

A. Probably a half a dozen nights.

Q. Was there a light upon it?

A. There was.

Q. Each time when you saw it?

A. Yes, sir.

Q. You are sure about that?

A. I am.

Q. Never saw it there after night without a light?
A. I did not.
Q. The same sort of light?
A. Yes, sir; a white light.
Q. Now, will you tell us what obstruction there was further west?
A. There was a lime box furthest west, and there was some sand there and broken brick.
Q. What was next towards the east curb?
A. There was sand and brick there. I didn't take no diagram of it. There was a mortar box to the southeast, and there was a lime box, a big box—piano box—they kept lime in, and there was some sand there.
Q. You examined it close enough to know that?
A. Yes, sir; I know a lime box when I see it.
Q. You examined the material closely enough to know the difference between the boxes and what there was there?
A. Yes, sir.
Q. This obstruction continued from that point to the east curb, did it—from the furthest obstruction west to the east curb?
A. No; there was a space in there between the curb and box.
Q. Next the east curb?
A. Yes, sir.
Q. Close to the curb?
A. Yes, sir.
181 Q. A space for the water to run, so as to clear the gutter?
A. I didn't notice that.
Q. How dark?
A. Oh, it was pretty dark.
Q. Any moon that night at all?
A. No; I don't believe there was.
Q. Was it raining?
A. It had rained some; yes, sir.
Q. Have you talked this matter over with anybody?
A. No, sir; I was in bed yesterday when the summons came; never dreamed anything about it when I was subpœnaed.
Q. Never talked with anybody, did you?
A. No, sir; never dreamed there was a lawsuit about it.
Q. It never was mentioned to you until the last trial?
A. Not until I got the subpœna.
Q. It was not mentioned when you got the subpœna?
A. It was not mentioned then to me; the subpœna came there.
Q. Was it ever mentioned to you up to the time you got a subpœna for this last trial?
A. Never was mentioned to me at all, sir.
Q. By anybody?
A. No, sir.
Q. Never talked it over with anybody?
A. No, sir.
Q. Not the least?
A. Not the least.
Q. You swear to that positively, do you?

A. I do; yes, sir.

Q. How did anybody know you knew anything about it?

A. I didn't know how they knew until the subpœna came there to the house for me. I don't know how they knew it without they got it from——

Q. What day of the week was it?

A. I could not tell you the day of the week. I didn't keep no memorandum of it.

Q. You have no memorandum on that subject?

A. No; I didn't keep no memorandum of it. It is six or seven years ago.

Q. It is a long while back to remember distinctly?

A. It is, sure.

Q. Is your memory on that point as good as it is on the other?

182 A. No, sir; it is not. I don't suppose I would not have known anything about it if it had not been for this accident.

Redirect examination:

Q. What is your business?

A. I am working for the C., C. & C. Railroad Co. as a brakeman.

Q. What was your business in 1879?

Mr. WILCOX: He said he had no business at that time.

The WITNESS: I said I was not working. That was my business at that time, but I was not working.

Q. What was your business at that time?

A. I was working for the C., C. & C. Railroad Co., only that I was not working then; I was off.

Q. Your business was the same?

A. Yes, sir.

Testimony of Jacob Kohli.

JACOB KOHLI, called on behalf of the defendant, being sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. Where do you live?

A. 439 Woodland avenue.

Q. What is your business?

A. I keep a saloon and boarding-house.

Q. Where did you live in November, 1879?

A. I lived on Bank street, at Schuepbach's. I was boarding there then.

Q. Do you remember seeing any building material in the street in front of the block adjoining Schuepbach's?

A. Yes, sir.

Q. Do you remember the accident occurring November 12th, 1879, while you were boarding there?

A. I remember about an accident there, but I could not tell just exactly what day it was. It was about this time. I don't know the date.

Q. Where were you on the evening of the day on which the accident occurred?

A. Well, I was at Schuepbach's.

Q. Where were you when you heard of the accident?

A. In Schuepbach's.

183 Q. When you heard of it what did you do?

A. Me and Mr. Schuepbach went out.

Q. What did you see?

A. Well, I seen a buggy stood there and just drove off when I came out.

Q. How far was the buggy away when you saw it?

A. I could not tell that.

Q. Which direction was it facing?

A. It stood up towards St. Clair street?

Q. Which direction did it go when it started off?

A. Up towards St. Clair street.

Q. How near the middle of the road did it stand?

A. I could not tell that.

Q. What kind of a buggy was it?

A. Well, it was a top buggy.

Q. Was the top up or down?

A. I can't tell that.

Q. How long did you stand there looking at it?

A. Well, a few minutes. I don't know exactly how long. I did not see the buggy long. It drove right off when we got out.

Q. How near the building material did the buggy stand?

A. I could not tell you that.

Q. Where was the building material?

A. In the road there, on one side of the road.

Q. Which side of the building material was the buggy?

A. On the west side.

Q. Describe where the building material stood and where the buggy stood.

A. The material was this side, towards Schuepbach's place, and the buggy stood out in the middle of the road, I guess.

Q. Was the side of the buggy or back of the buggy towards Schuepbach's?

A. I don't understand how you mean.

Q. Which part was facing towards Schuepbach's?

A. One side of the buggy.

184 Q. Could you see the buggy plainly?

A. I just seen the buggy. So quick as we got there they drove off with the buggy. I can't tell much about the buggy.

Q. What did you do when you went out?

A. Me and Mr. Schuepbach went out and looked a little at the track — if we could see any track of the buggy.

Q. What did you see?

A. We saw, or I seen, the track coming down from St. Clair street, and it looked just like they was going to turn the buggy around—the way the track looked.

Q. How far from the curb was the track—from the east curb?

A. Curb? I don't know what that means.

Q. The edge of the sidewalk. How far from the edge of the sidewalk was the track in the street?

A. Oh, I can't tell that exactly. It must have been about a little over the middle.

Q. Where was this track that you saw in the street—how near to Schuepbach's?

A. I don't know how near it was. I could not state how many feet.

Q. It was not on the sidewalk, was it?

A. No, sir.

Q. How far from the sidewalk?

A. I can't tell that.

Q. How far should you think?

A. Well, I can't tell you.

Q. How long was the track? How much of it did you see?

A. Oh, didn't see very much. I don't know how long the track was.

Q. Did you follow it to see where it came from?

A. We followed it a little piece, not very much, though.

Q. Did you follow it to see which direction it went?

A. We looked where it came from.

Q. Did you look to see how near the building material it came?

A. No, sir.

Q. Do you know what sort of building material there was
185 in the street there, do you remember?

A. There was a mortar box there in the street and some sand.

Q. Do you remember anything else?

A. There was a box there, a post nailed to it, and a lantern on it.

Q. Where was that located?

A. There in the street—on one side of the street.

Q. How far out from the sidewalk was this box with the lamp nailed on it?

A. I could not tell you that. I didn't measure that.

Q. What was there between that box with the light nailed on there and the sidewalk?

A. Well, it was materials there. I don't know what. I can't remember that.

Q. How near to this mortar box did the buggy tracks go?

A. Right onto the box.

Q. What other lights were there around there?

A. The gas-light was burning on the other side.

Cross-examination by Mr. WILCOX:

Q. How do you know it was?

A. Of course I saw it.

Q. Of course you saw it?

A. Yes, sir.

Q. Did you see it?

A. Yes, sir.

Q. Did you speak of it?

A. Speak of what?
Q. Of the light burning on the other corner of the street there?
A. I didn't speak nothing about it.
Q. Did anybody speak to you about it?
A. No, sir.
Q. Your attention was not called to it, was it, in any way?
A. I seen the gas-light was burning and the lantern.
Q. Was your attention called to it in any way?
A. I don't know how you mean that.
Q. Did anybody say anything about it to you?
A. No, sir.
Q. How far did you follow those tracks?
A. A little piece.
Q. How big a piece—three feet?
A. Oh, more than that.
186 Q. Four feet?
A. I don't know how much it was.
Q. About how far?
A. I could not tell you.
Q. Give us an idea.
A. I can't tell you; I don't know how far.
Q. Tell us by something in the room here.
A. Just about as far as to that second chair (eighteen or twenty feet).
Q. Did you see anything else in the street there?
A. I seen some materials there.
Q. Outside of materials there, what did you see?
A. When I came out I seen the buggy there.
Q. Anything else?
A. Lots of materials.
Q. Anything else?
A. I seen that lantern there.
Q. Anything else?
A. And the boxes.
Q. Outside of this material, the buggy, and light that you saw there, did you see anything else?
A. I seen Mr. Schuepbach.
Q. Anything else?
A. I don't know; maybe I did. I can't tell if I seen anything else.
Q. I want your recollection; was there anything else you saw there?
A. I don't know.
Q. Did anybody say anything to you about anything else in the street there?
A. Not in the street; no, sir.
Q. You say the buggy was beyond the middle of the street from you?
A. Yes, sir; just about.
Q. Just about the middle?
A. Yes, sir; I could not tell you exactly.

Q. How many horses were there to the buggy?
A. I don't know; I didn't look at the horses.
Q. You were looking at the buggy?
A. Yes, sir.
Q. What color were the horses there—was there?
A. And I can't tell the color neither.
Q. Was there a white horse there?
A. That is more than I know.
Q. If there had been a white horse there you could see it, could you not?
A. Maybe; I don't know. I can't tell you whether it was white or black.
187 Q. How many people did you see there?
A. I didn't see anybody but Mr. Schuepbach.
Q. Was anybody in the buggy?
A. I don't know.
Q. You don't know whether the top was up or down?
A. No; I can't tell you that.
Q. Could you not see plainly enough to see that?
A. I don't know; I can't tell you if it was up or down.
Q. You can't tell whether anybody was in the buggy or not?
A. No, sir.
Q. It was a pretty dark night, was it not?
A. Yes, sir.
Q. So dark you could not see very distinctly?
A. It was light enough to see.
Q. Were you there every night?
A. Yes, sir.
Q. Did you see this building material there other nights?
A. Yes, sir.
Q. How many nights?
A. That is more than I can tell.
Q. About how many?
A. Just about as many as the material was there.
Q. How many was that?
A. That is more than I can tell you.
Q. Estimate it; tell us something.
A. I don't know. I could not tell you. I have been boarding there several years. I was there when they commenced building, and I seen it every night.
Q. One, two, a dozen, or twenty or fifty?
A. Just as many times as I went out the front door I could see it.
Q. You went out every night?
A. Of course, I went out and came in every night.
Q. Was there a light there every night?
A. That is more than I can tell you.
Q. You will not say there was a light there every night, will you?
A. I could not tell you that.
Q. Do you remember anything about that?
A. Oh, I remember I seen lights many times, but I could not tell you if it was every night or not.

188 Q. There might have been some nights there was not any light there?
A. That I don't know.
Q. You didn't pay any attention to it?
A. No; I didn't pay attention to it every night.
Q. Was this lamp over on Johnson street lit every night?
A. I don't know.
Q. Why don't you know?
A. Because I didn't take notice of it.

Testimony of Frederick Uhl.

FREDERICK UHL, called on behalf of the defendant, being sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. What is your business?
A. Contracting business now.
Q. What was your business in 1879?
A. Draughtsman.
Q. For whom?
A. I was working for Mr. Grease.
Q. Did you do any work for yourself?
A. Yes, sir.
Q. Did you make drawings for the Rosenfeld block on Bank street?
A. Yes, sir.
Q. Superintend the construction of the building?
A. Yes, sir.
Q. Did you hear of the accident that occurred in front of the building about that time, November 12th, 1879?
A. I could not remember the date exactly, but I was——
Q. Did you hear of the accident that occurred in front of the building about that time?
A. Yes, sir.
Q. When did you hear of it?
A. The next morning.
Q. What did you do after hearing of it?
A. I went down there the next morning—generally I went down there pretty near every morning to see what they was doing. When I came down there Mr. Kostering told me——

The COURT: Tell what you did.

A. I went and made out a sketch of the things that was located there—a scale drawing.
Q. Of what things?
189 A. Took a measurement of the mortar box and lime box and the width of the street and everything that was located there.
Q. Have you that sketch?
A. No, sir; it was left here the first time this case was tried.

Q. Have you seen it since?

A. I have not seen it since I was on the witness stand at the last trial.

Q. Can you tell what the dimensions are of those articles?

A. I could not tell exactly. I know the dimensions of the boxes—what they were.

Q. In the first place, can you give the width of the street?

A. About sixty feet from curb to curb.

Q. How far from the west curb was it to the material that was furthest out in the street?

A. I guess it was about two-thirds of the street.

Q. What was the article or object that was furthest out in the street?

A. Lime box.

Q. Describe the lime box.

A. Well, it was a box three and a half by five, sometimes four by five, and about three feet high—four feet high; just a kind of dry-goods box.

Q. What material was next east of the lime box, if you remember?

A. Well, I guess there was some sand between the lime box and the mortar box.

Q. What was the mortar box?

A. The mortar box was about—a box of about 4 by 8 or 5 by 9—what they generally use for mortar boxes, and then there was a space between the mortar box and the curb.

Q. How did you make your measurements at that time?

A. Made them with a tape line.

Q. With whom did you make them?

A. With Mr. Kostering.

Q. What obstruction, if any, was there between the lime box
190 and the west curb of the street?

A. Not any.

Cross-examination by Mr. WILCOX:

Q. Who took the figures off the line, you or Kostering?

A. I did.

Q. Mr. Kostering did not?

A. No, sir.

Q. When you say the mortar box was 4 by 8 or 5 by 9, about the same as they use, you are guessing at it?

A. They don't vary but about a foot.

Q. You are guessing at it, then, ain't you?

A. I made a measure of it at that time, but I could not swear now.

Q. Now, you are simply guessing at the actual measurement?

A. Yes, sir.

Q. You don't know anything about the position of those boxes the night before, do you?

A. No, sir.

Q. You don't know whether they were in the same position the next day that they were the day before?

A. No, I could not tell about that.

Testimony of Samuel Baker.

SAMUEL BAKER, called on behalf of the defendant, being sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. You are an assistant in the city civil engineer's office?
A. Yes, sir.
Q. How long have you been there?
A. About thirteen or fourteen years.
Q. Have you the means of stating what gas-posts there are on Bank street from St. Clair north, or were in the fall of 1879?
A. Yes, sir.
Q. Can you state the location and number of gas-posts?
A. Yes, sir.
Q. (Handing paper to witness.) What is this?
A. This is a map showing the location of the lamp-posts as they are on Bank street, between St. Clair and Lake.
Q. State whether they show the lamp-posts as they existed in 1879.
A. They do, to the best of my knowledge and belief.
Q. From what data did you construct that map?
191 A. This map was made in the engineer's office, by our draughtsman, and from some observations and measurements taken to locate the posts last year, the time this case was tried.
Q. Who made the observations in 1879, if any one made them?
A. I did.
Q. State how the observations were made. What minutes, if any, were taken of it?
A. The location was made by driving through there in a buggy and noting the location of the lamp-posts, so they could be put upon a map on a small scale, very much smaller than this, approximately. We did not take any particular—just noted them—made a little cross representing the lamp on the map we have in the office. That whole distance on our map would only be about an inch from Johnson street. At that time didn't measure anything; only noted the location as we went through the street.
Q. When were the measurements made to locate them as they are now?
A. They were made when I testified before.
Q. State whether there were any changes that you know of in the location between the time of the measurements and 1879.
A. Not that I know of.
Q. State how many lamp-posts existed in that street between St. Clair street and Johnson street, according to your observations made in 1879.
A. There were two, not counting the one at Johnson.

Cross-examination by Mr. WILCOX:

Q. You did not make that plan yourself?

A. No; I did not draw this.

Q. You do not know from your own knowledge that it is an accurate plan?

A. Yes, sir; it is. It is by scale; it seems to be correctly drawn.

Q. You do not know from your own personal knowledge that that is a correct map?

A. I didn't measure it. I am satisfied it is correct.

192 Q. You took your measurements from the little map?

A. No; from other maps—from the map of Bank street.

Q. You didn't measure even in 1879? You rode through in a buggy?

A. Yes, sir; went through.

Q. That is the way you got the location?

A. For this map.

Q. In 1879, I am talking about.

A. Yes, sir; that is when I got the relative position.

Q. You put them then on your little map in the office from that observation?

A. Yes, sir.

(By Mr. SHERWOOD:)

Q. What is the distance between St. Clair and Johnson street?

A. Three hundred and thirty-seven feet.

Q. How far are the lamp-posts apart?

A. There is a lamp-post about 160 feet south of Johnson street, on the east side of the street.

Q. Any on the west side?

A. Yes, sir; there is one about twenty feet further south, on the west side.

Q. Are there any at St. Clair street?

A. Yes, sir; there are four—one at each corner.

Q. How wide is Bank street?

A. 99 feet.

Q. How wide is the roadway?

A. 59.

Testimony of William Miller.

WILLIAM MILLER, called on the part of the defendant, being sworn, testified as follows:

(By Mr. ROBISON:)

Q. You live in the city here?

A. Yes, sir.

Q. Were deputy sheriff here at one time?

A. Yes, sir.

Q. Whereabouts did you live in 1879?

A. At 118 Bank street.

Q. I will ask you whether an accident to some men in a buggy, one evening, came to your knowledge?

A. Yes, sir.

Q. Where did you live with reference to where that accident occurred?

A. Probably about a hundred feet from it.

Q. Did you live on the same side of the street or on the other side?

193 A. I lived on the same side—west side.

Q. Did this accident occur on the same side of the street you lived on or on the other side?

A. It occurred on the east side.

Q. And you lived on the west side?

A. Yes, sir.

Q. How near opposite to that did you live?

A. I lived diagonally, a little distance, about a hundred feet by measurement, up this way a little. The accident happened below me, and I lived across on the west side, kind of diagonally from where this accident was. I lived south of the accident.

Q. How far south from a direct line?

A. I should claim it was about a hundred feet.

Q. I will ask you whether you witnessed that accident?

A. Yes, sir; I did; I saw it when it struck.

Q. You saw the buggy when it struck there?

A. Yes, sir.

Q. With these two gentlemen in?

Objected to.

Q. State what you saw.

A. Well, sir, I stood there by my gate on Bank street and I saw this team driving down Bank street hugging——

Q. State on what particular portion of Bank street, the east or west side, they were driving.

A. They was driving on the east side of the street.

Q. How near the curb-stone or where it should be?

A. Well, they were hugging the curb, just as close as they could get to it.

Q. State what you saw.

A. What attracted my attention a great deal was the speed of the driving and striking.

Objected to.

Q. Tell how they were driving and where they went.

A. They was coming down Bank street from St. Clair on what I call a pretty lively trot, hugging the east curb. When they came along in front of Hogan & Harris'—there is a walk that comes

194 across from the curb, a crossing—and the wheels struck that and it rattled, and they kept still driving close to the curb, and the first thing I knew they fetched up into this mortar box. They struck the box and I heard Mr. Elwood hollow and I started and ran into the house. I didn't go near the wreck at all.

Q. You say you heard Mr. Elwood hollow?

A. Yes, sir.

Q. Were you acquainted with Mr. Elwood?

A. About 23 years.
Q. Know his voice?
A. Yes, sir.
Q. Know it was he who hollowed?
A. Yes, sir.
Q. What else did you observe?
A. What do you refer to—with regard to the light or what?
Q. Yes; with reference to the lights, what did you observe, if anything?
A. There was a light burning on the lime box, and the lime box was probably the height of one of these organ boxes. They had the light on a stick about three feet on top of that, a lantern, and there was a lamp burning on the corner of Johnson and Bank street, the southeast corner of Johnson.
Q. State what other lights you saw, if any you saw, along the street there.
A. Schuepbach had a light hanging over the door; that was lit. That was right opposite—the same side the obstruction was on—and had both gas-lights in his window of his saloon.
Q. State what light those different lights afforded to the street.
A. I don't know that I could tell what they afforded. There was one gas-light there on the corner.
Q. How light was it in the street by reason of those lights?
A. Light enough to see that.
Q. Light enough to see what?
A. The obstruction there.
Q. State whether or not you could see it from where you were when you saw this accident.
A. I could see the light on the lime box; also the light on Johnson street.
195 Q. State whether or not you saw these obstructions.
A. Yes, sir.
Q. State how light it was in the street along there.
A. Well, it was a pretty good light, I should think. I should call it so.
Q. State whether it was light enough for ordinary observation of the condition of the street.
A. It was close to that obstruction.

Cross-examination by Mr. WILCOX:

Q. You say there was a light there?
A. Yes, sir.
Q. On the obstruction?
A. Yes, sir.
Q. Can you tell us where that light was?
A. It was on the lime box.
Q. Are you certain?
A. Yes, sir; I saw it.
Q. Whereabouts on the lime box?
A. It was on the west end of it. The end that stood next to the street.

Q. Northwest or southwest of it?

A. West of it.

Q. The side or corner?

A. The lime box stood in the street, the same as if this was the street here (indicating), backing up one end of it towards the mortar box, and this end (indicating) would be towards the center of the street next to it, and it stood on its end; it was hung on this end.

Q. That is the small side of the box?

A. It stood lengthways, this way (indicating), from the east curb, and, of course, this would fetch it at the end. It was on the end of this box that this lamp was on.

Q. Not on the corner?

A. No; on the end of the lime box.

Q. You are sure it was on the lime box?

A. Yes, sir; I saw it.

Q. Did you testify upon that subject on the first trial of this case?

A. I can't remember whether I did or not.

Q. Do you not remember that you did?

A. I don't remember. I might and might not.

Q. You testified upon the trial?

A. Yes, sir.

Q. Was your memory then as good as it is now?

196 A. I don't know why it should not be.

Q. It was nearer the time of the occurrence, was it not?

A. A little nearer.

Q. If there is any difference between your memory then and now would it be better then or better now?

A. I don't think there is any difference.

Q. Answer the question. Which would be the better, then or now?

A. I should say it would be just as good now as then.

Q. I will ask you if you did not testify at that time that whatever light there was was nailed upon the mortar box instead of on the lime box?

A. If I did I made a mistake. I don't remember testifying that. If I did I made a mistake. I was wrong.

Q. How far is it from where you stood to the curb on the east side, where this obstruction was?

A. I told you I think it is about a hundred feet.

Q. Now, if I got your statement right, you said to Mr. Robison that your gate was about a hundred feet south of a direct line drawn across from the obstruction?

A. I meant it would measure a hundred feet from the corner of this obstruction to my gate.

Q. From which corner?

A. From the west corner.

Q. From the nearest point of the obstruction?

A. Yes, sir; that is what I meant to say.

Q. Then how far was it from where you stood to where you saw this carriage as it struck the mortar box?

A. It was about the same distance, but it was back——

Q. It must have been further——

A. The mortar box was right back on the east end of the lime box, where the lamp was.

Q. You say it was very light there?

A. It was quite from that light.

Q. You could see everything that happened?

197 A. I could see that; yes, sir.

Q. Could you see everything that happened around there?

A. I saw that much.

Q. Was it light enough to see everything that went on there?

A. Light enough to see everything that went on. I could see when they struck the mortar box, if that is what you mean. I don't hardly understand you.

Q. It was light enough to see exactly what happened there, was it?

A. I could see it when it struck the mortar box, if that is what you mean.

Q. I know you could see that particular thing, but could you see anything else?

A. I could see the obstruction.

Q. Was it light enough to see everything that happened there?

A. Yes, sir.

Q. What was the first thing you did see in regard to the buggy coming down that street that night?

A. Just as I said before, I saw them coming down Bank street from St. Clair, hugging the east curb.

Q. Where did you first see them?

A. Just above Mr. Hogan and Harris' there.

Q. Where is Hogan and Harris'? The jury don't know.

A. I don't know exactly where they are. It is the second block above the accident—south of where the accident was.

Q. Where, in relation to St. Clair street, is it?

A. The first block on the corner of St. Clair and Bank is the Waring block, the next is where Ellis's store is, and the next is the Hogan and Harris block.

Q. That is where you first saw them?

A. Yes, sir.

Q. They were hugging the east curb?

A. Yes, sir.

Q. Can you tell how close to the curb they were?

A. I could not.

Q. Could you tell who were in the buggy?

A. I could not, sir.

Q. And you watched the buggy, did you, as they drove

198 down the east side of the street?

A. I did, sir.

Q. All the time?

A. Yes, sir.

Q. You were looking directly at it?

A. I was, sir.

Q. You could not tell who was in the buggy?

A. I could not, sir.
Q. Why not?
A. The top was up. How could I tell who was in it?
Q. Was the top a closed top?
A. It was not closed in any more than it was one of these that lifts up.
Q. What kind of a buggy was it?
A. I could not tell exactly what kind of a buggy. I saw it across the street as they drove by.
Q. They passed you coming down on the east side of the street exactly opposite you?
A. Yes, sir.
Q. You watched them as they came down and passed?
A. Yes, sir.
Q. You say you could not see who was in the buggy?
A. I think not. I could not see through leather very well.
Q. Was the top of the buggy up?
A. Yes, sir.
Q. Could you tell whether there was more than one person in the buggy?
A. I could not. There might have been five in there. I could not see them.
Q. You watched them until they struck something, did you?
A. Yes, sir.
Q. Watched them until they struck the mortar box?
A. Yes, sir.
Q. Tell the jury just exactly how they struck the mortar box.
A. I can't tell exactly how they struck that.
Q. You were looking at them?
A. I was looking at them. I could not tell you whether it was in the middle of the box or pretty near the west end of the box.
Q. That would be this way?
A. Yes, sir; towards——
Q. Which way were the horses pointing when they struck
199 the mortar box?
A. They were kind of sheering.
Q. Which way were they pointing?
A. West, as far as they could get them.
Q. How did they strike it, now?
A. They struck it on the forward wheel—must of struck it, as——
Q. Did they?
A. I am not positive. I told you I didn't go over to the scene.
Q. But you were looking right at them?
A. I was looking at them.
Q. How did they strike?
A. To the best of my knowledge, the first forward wheel struck the mortar box.
Q. Which wheel?
A. The right-hand wheel, for they were turning to the left.
Q. Now, then, before I go further, please tell us in what order the

obstructions were in that street. What was first and nearest to the east curb?

A. Well, there was a lot of old broken brick.

Q. What came next to the brick?

A. Besides the brick there was where they sifted the sand; then came the mortar box.

Q. What came next?

A. Then came the lime box.

Q. Was there not a pile of sand between the lime box and mortar box?

A. There might have been a little there. I think there was either sand or some siftings.

Q. How far apart were the mortar box and lime box?

A. I could not say; probably five or six feet.

Q. Was not that space taken up by a pile of sand?

A. It was either sand or these coarse siftings after they screened it.

Q. Whatever it was, it was some kind of debris?

A. Something of that kind; yes, sir.

Q. Was there any lumber there—any boards, plank?

A. I don't remember whether there was; there might have been some next to the curb, over further north; I am not positive
200 in regard to that.

Q. Not what might have been, but whether there was?

A. I don't remember of seeing any. There might have been and I not seen it. I was not paying strict attention to that.

Q. When they struck the mortar box what happened?

A. I heard Mr. Elwood hollow something, and I started right into the house as quick as they struck the mortar box.

Q. How do you know it was Elwood?

A. I could tell by the voice.

Q. Is that the only way?

A. Yes, sir.

Q. You could not see?

A. I did not stop to see. Just as they struck the mortar box I started into the house.

Q. What did Elwood say?

A. I don't remember now what he said.

Q. But just the first time you heard his voice and as quick as you heard his voice you turned and went into the house?

A. Yes, sir.

Q. How long did you stay there?

A. I say as quick as it struck. I ain't positive whether this man King or Elwood—one of them—hollowed and I started into the house. I am sure the first I heard was Elwood.

Q. Did you hear more than one?

A. I believe there was another man.

Q. There was another man hollowed?

A. Yes, sir.

Q. What did he say?

A. I don't know what he did say.

Q. Did you hear?

A. I didn't hear what he said. I started then and went into the house.

Q. How close were the two hollowings?

A. They were not far apart.

Q. The same instant almost?

A. I had started to go upstairs.

Q. How close were they together?

A. They was not a great ways apart.

Q. How many seconds?

A. Oh, probably two seconds or a second.

Q. Almost together?

A. Almost together; yes, sir.

Q. You said you could not tell what either one of them said.

201 A. I did not. I think Mr. Elwood hollowed, "Mat., is that you?" or something of that kind.

Q. What makes you think he used those words?

A. I say to the best of my memory, that is what he said.

Q. I thought you said a moment ago you could not tell what he said?

A. I don't know whether I said so.

Q. Didn't you say a moment ago——

A. You asked me what the second gentleman said.

Q. I asked you what Elwood said first?

A. Well, what did I answer?

Q. You said you could not tell.

A. No; I understood, as near as I could get at it, he hollowed, "Mat., is that you?" Something of that kind. I am not positive as regards to that.

Q. Now, if he said, "Mat., is that you?" you would know it; you could not be mistaken?

A. That is what I am thinking he said. I would not be positive whether it was that.

Q. You know whether he said that or something else?

A. I can't be positive. I think it was what he said. I started to go upstairs at the time he hollowed.

Q. It is mere guessing on your part?

A. It is not mere guessing; it is my opinion—the best of my knowledge at the present time.

Q. Where was Mr. Elwood when he said that?

A. He was there in the buggy. I guess he hadn't got out yet.

Q. Did the buggy tip over?

A. Not exactly tip up.

Q. Didn't tip over?

A. Not while I was there; just struck the box, and I turned and started upstairs.

Q. You didn't see any more of the accident?

A. I did not.

Q. Didn't see anybody fall out of the buggy?

A. I did not, sir.

Q. Is that all you saw?

A. That is all, sir.

202 Q. You understand that clearly—that is all you saw?
A. That is all, sir.
Q. You testified in this case at the last trial?
A. Yes, sir.
Q. You were in the employ of the city at that time, were you not?
A. Yes, sir.
Q. I will ask you whether you did not testify at the other trial, in answer to a question asked you by the court, which was this: "Tell us whether they went fast, and how fast;" and if you did not answer, "I could not say exactly. I should judge they were going ten or twelve miles an hour, pretty rapid for city driving—that is, in the city limits—and the next I saw they were into this mortar box on Bank street. Out comes a big man—I didn't know who he was at the time—out of the buggy, and then I heard him groaning. I stood at the gate. The carriage came along just as that happened, and Mr. Elwood—I knew him and knew his voice—hailed this carriage, and the carriage went by this pile of stuff, and the gentleman that fell out, whoever he was, was put in there. I didn't know the man at that time, and the carriage then started to the Kennard House, with this gentleman in it, from the wreck. That was about all there was of it that I saw." Is that your language at the other trial?
A. It may have been. I don't remember just that exact language.
Q. What do you think about it?
A. I say I don't remember using that exact language—that much of it. I think there is a little added to that.
Q. Those are about the facts as you stated them?
A. I don't think they are; they might be.
Q. Will you swear you did not testify in that exact language?
A. I will not, sir.
Q. Your attention was called to all of those facts in the case, were they not?
A. Might be.
203 Q. And this language states the facts as you then remembered them, does it not?
A. It must be if it appears to be down there.
Q. Now, were you mistaken then or now about seeing a man fall out of the buggy?
A. I must have been mistaken then. I am pretty near right now.
Q. You think you are right now and mistaken then?
A. Might have been.
Q. How could you have testified then that you saw a man fall out of that buggy if it was not the fact?
A. I don't think I did testify it.
Q. How could you testify then that you heard a man groan, if it was not the fact?
A. I don't know how I could do that.
Q. But you did testify to it?
A. You have got it there.
Q. You did testify to it?

A. I guess I must have done it.

(By the COURT:)

Q. Do you remember anything about it?

A. I remember I testified here. I don't remember testifying that.

(By Mr. WILCOX:)

Q. Who were there at the time of this accident?

A. I don't know who were there.

Q. Anybody except these men in the buggy?

A. There might have been. I did not see them.

Q. You could have seen them?

A. If I had staid there I could have seen them. If I had staid at the gate I could have seen them.

Q. I am talking about the time you were there.

A. That is what I am saying.

Q. Did you see anybody else?

A. I did not.

Q. Could you have seen them if there had been anybody else there?

A. Before I left?

Q. Yes.

A. I guess I could have seen them if there had been anybody else there.

Q. What kind of a night was it?

A. Kind of misting, if I remember right.

Q. A light rain, was it?

A. I think so, if I remember right.

Q. Did I not ask you before if it was raining, and did you
204 not say, "Yes, I think so?"

A. I think now, to the best of my knowledge, it was raining a little.

Q. And you were standing out at the gate?

A. Yes, sir.

Q. Could you see that buggy as it came around the corner of St. Clair onto Bank street?

A. I don't know that I could. I did not notice it until it got along where I told you, by the second block from the corner.

Q. Did you not testify before you saw it as it came around the corner, as it came onto Bank?

A. I don't remember.

Q. I will ask you if you did not testify that it was the left front wheel that struck the mortar box, on the other trial—they were going north—that is, the front wheel toward you struck the mortar box?

A. I don't remember swearing anything of the kind.

Q. Did you not testify that at the time the buggy struck the mortar box the horses were pointing a little east of north—a little northeast, that is—in that direction?

A. I don't remember any such question being asked or of swearing to any such thing. I don't remember any such question.

Q. How high was that mortar box?
A. Well, to the best of my ability, I think it was a little over two feet.
Q. What was in it?
A. There was some mortar in it.
Q. How much?
A. I could not say how much.
Q. About how much?
A. I could not say exactly how much there was in there.
Q. How do you know there was any in it?
A. There was some in that afternoon, about five o'clock.
Q. How do you know?
A. Because I was over there and saw it.
Q. What were you doing over there?
A. Looking at them work at the——
Q. Looking at whom?
A. The men working.
Q. Were all the men working there?
A. Yes, sir.
Q. What men were you looking at?
A. Well, I was talking to the boss—Frank——
205 Q. Who else was there?
A. I don't remember. I don't know the other men's names.
Q. Was anybody there?
A. Yes, sir.
Q. How many?
A. I could not tell you how many men. There may have been a dozen or twenty or only one.
Q. How many were there?
A. I don't know. I did not notice how many. I was talking to Frank there.
Q. Kostering?
A. Yes, sir.
Q. Where did you talk to him?
A. Right there on the curb.
Q. Don't you know it is a fact that there were no men working on the job at that time?
A. I don't remember any such thing. I remember the men being working there.
Q. You heard Mr. Kostering testify on the other trial, did you not?
A. No, sir; I was not in when he testified.
Q. You say they were laying brick there?
A. To the best of my recollection, they were doing something; might have been doing work inside. There was men working there.
Q. Not what might have been. What were they doing?
A. I could not swear whether they were laying brick or working inside.
Q. Why can't you?
A. I was not paying any attention to them.

Q. But you saw a number of men working there?

A. I saw men there. I was not watching whether they was working or setting down, or what they were doing. I was talking to Mr. Frank. I was not paying attention to the men.

Q. About what time was that?

A. I think between four and five.

Q. Was it raining?

A. No; I don't think it was.

Q. Do you know anything about the putting up of that light?

A. I was not there when the light was put up.

206 Q. You saw this obstruction there, did you not, at the time?

A. Yes, sir.

Q. Was there always a light upon that obstruction?

A. There was a light put up every night but either the night before or two nights before the lamp was stolen.

Q. How do you know it was stolen?

A. Well, it was gone anyway—it walked off.

Q. There was a night or two there was no light there?

A. Just one there was.

Q. Just one night?

A. That is, the light was lit, and the lamp was gone the next morning.

Q. You remember one night there was no lamp there?

A. Yes, sir.

Q. You saw the obstruction there in the darkness?

A. No, sir; the lamp was there in the evening when I passed it.

Q. How do you know it was not there all night?

A. I heard Frank say somebody stole it.

Q. You are testifying from what somebody told you?

A. You asked me if there was a light there every night, and I told you the lamp was stolen either two or three nights previous to this accident, but it was light the fore part of the night, when I passed; must have been stolen in the night or taken down.

Q. I do not want your conclusion or what somebody else has told you. Did you see the lamp there every night?

A. Yes, sir.

Q. The same kind of lamp?

A. Yes, sir.

Q. Hanging in the same place?

A. Yes, sir.

Q. Now, tell us how high that light was from the lime box you are speaking of.

A. Well, I think that the stake that was on was probably two and a half or three feet higher than the box. The box looked as if it was an organ box, that they pack organs in, a very high box; I think, five or six feet high.

Q. The stake was how long?

A. To the best of my knowledge, two and one-half feet high.

207 Q. Did you say before it was four or five feet high?

A. I may have said that.

Q. If you said so on the other trial that was probably so?

A. Well, it was from two and a half to three feet high; I would not be positive in regard to the exact height.

Q. Now, was it as much as five feet high?

A. No, I don't think it was.

Q. Was it as much as four?

A. I think it was about two and a half or three feet.

Q. Then you were mistaken in the last trial?

A. I might have been in the height; I never measured it.

Q. If the lime box was five feet high and the stake three feet long the lamp was eight feet in the air?

A. That would be about the height.

Q. Did you see Mr. Kostering that night after the accident?

A. No, sir.

Q. How soon after the accident did you see Mr. Kostering?

A. I won't be positive whether it was two or three days after.

Q. You did not see him the next day?

A. I do not think I did; no, sir.

Q. Are you sure about it?

A. I am pretty sure; I don't remember; I don't think I did. I am not positive about that. I think it was either two or three days after that.

Q. Did you talk with him about this matter?

A. They were talking about it; yes, sir.

Q. Did you talk with him about it?

A. I asked him in this way: I says, Frank——

Q. I asked you if you talked with Frank Kostering about it?

A. No, sir.

Q. Did you ever talk with him about it?

A. Yes, sir.

Q. When?

A. Oh, several times since.

208 Q. Now, will you tell us what kind of horses were driven before this carriage that you saw?

A. I did not pay much attention to the horses. I think they were bay horses.

Q. What makes you think they were bay horses?

A. Well, from what little I could notice of them I think they were bay horses. I did not pay much attention to the horses.

Q. Were they bay horses?

A. I think they were.

Q. You could tell that night what color the horses were?

A. I could if I had taken particular notice.

Q. You were looking at them, were you not?

A. I was looking at them as they passed along.

Q. You want us to understand you could look across Bank street, a hundred feet, and see those horses coming down that time of night and could tell whether they were black or bay?

A. I could; might not be exactly positive; they might have been dark bay; might have been black. I would not be positive in regard to the color of the horses.

Q. I asked you what they were and you said they were bay?

A. I think they were dark bay; I told you I would not be positive in regard to that. I was not paying strict attention to the horses.

Q. Both the same color, were they?

A. I could not say that.

Q. Why not?

A. I did not pay much attention to the horses.

Q. If one was a white horse you could have seen it?

A. I should have been apt to see it if it was a white horse. I think they was pretty near the same color.

Q. Therefore you say they were both bay horses?

A. To the best of my ability, they might be dark-bay horses.

Q. When they struck the mortar box did they come to a stand-still?

A. Pretty near it.

Q. Did they?

209 A. As quick as they struck the mortar box I turned and went upstairs.

Q. Answer the question if you can.

A. That is all I saw. When they struck it I ran off upstairs. The moment they struck that mortar box I started to go into the house.

Q. Was not the question put to you at the last trial, "Did they come to a stand-still?" and did you not answer, "Yes, sir?"

A. I might have said that.

Q. Did you?

A. I don't remember that I swore to it.

Q. I asked you next, "When did the man come out of the buggy?" and you answered, "Just when it struck." Is that right?

A. Yes, sir.

Q. "Did the buggy follow him right over?" and you answered, "I didn't pay much attention."

A. Yes, sir.

Q. "You saw a man come out?" and you answered, "Yes; I saw something come out there."

A. I believe I said that.

Q. "How many men went out?" "Two pretty good-sized men, what would make three or four common-sized men. There was two men came out."

A. Yes, sir.

Q. "Did you know Mr. Elwood?" "I knew Mr. Elwood, but did not know him until he came out." "Could you recognize him?" "I have known Mr. Elwood probably for thirty or forty years, but not knowing him as he drove by in the buggy, I did not stop these people to ask who they were." Is that your testimony?

A. Yes, sir.

Q. "Could you not see him in the buggy?" "No; I could not see him in the buggy." "Could not distinguish who it was?" "No, sir."

A. Yes, sir.

Q. "Did you afterwards learn who it was?" "A. I learned it was

Mr. Elwood when he hailed this gentleman that had a hack to take this gentleman on."

A. Yes, sir.

Q. "Q. That is when you first knew it was Mr. Elwood?"

210 "A. Yes, sir."

A. Yes, sir; I remember that.

Q. That is when the hack came there and he hailed the hack to take Mr. King to the Kennard House?

A. Well, I had started upstairs then; I could not tell anything about the hack.

Q. That is what you referred to, was it not?

A. Yes, sir.

Q. Then you did see Mr. Elwood hail this hack that came down street?

A. I did not see Mr. Elwood hail the hack. I did not swear to such language.

Q. What did you say on that subject or swear to?

A. Mr. Elwood hollowed—I was not certain whether he hollowed to the hack or to Mat.

Q. What did you mean when you said, "I learned it was Mr. Elwood when he hailed this gentleman that had a hack to take this gentleman on. That is when I first knew it was Mr. Elwood?"

A. That is what I am saying now. I forget whether he hollowed "Mat." or to this rig, which I swore to; one or the other.

Q. You did see the buggy or hack come and get Mr. King or whoever it was?

A. I don't think I did.

Q. Did you see the hack come and get this man that was hurt?

A. I don't remember swearing to any such thing as that.

Q. What is the fact?

A. I don't remember seeing it. I don't remember swearing I saw the hack come and get Mr. King.

Q. I am asking you now what the fact is?

A. I say I don't remember.

Q. "Did both the men come out of the buggy at the same time when it tipped?" "A. I could not say positively whether they did or not; they might have went one on the other—right on top."

A. Yes, sir.

211 "Q. You were looking at this thing? A. Yes, sir."

A. Yes, sir.

"Q. And you saw the whole business? A. I saw that much of it."

A. Yes, sir.

"Q. Which wheel was it that struck the mortar box? A. I could not tell you." Is that so?

A. I don't remember answering that way.

"Q. Which way did the men go out, to the right or left?" "A. They went to the left—left-hand side of the obstruction."

A. Yes, sir.

"Q. Then it must have been the right wheel that struck the mortar box? A. Yes; I think so. I don't know which wheel struck

the mortar box. Q. The next thing you heard was what, after the buggy tipped? A. I heard Mr. Elwood hail the rig that was coming down."

A. I am not positive. I don't remember that—whether it was to the hack he hollowed or to this man Mat. I told you before I was not positive, but he hollowed.

Q. You are not now positive he hollowed to the hack?

A. No, sir; I am not.

Q. Was not this question asked you, "The next thing you heard was what, after the buggy tipped?" and did you not answer, "I heard Mr. Elwood hail the rig that was coming down?"

A. I might have testified to that, but — not remember now whether it was the hack he hailed or carriage or this man from the sidewalk.

Q. Your recollection is that was the first thing, and you answered, "Yes, sir?"

A. It may have been.

Q. "Did you not hear the man moan before that? A. I don't know that I did. I heard him moaning, but I don't know whether it was before or after Mr. Elwood hailed to the rig." Is that right?

A. Yes, sir.

212 Q. "Where was the team all this time? A. Stood there." Is that right?

A. It may be; I don't remember answering any such question as that. I don't remember the questions ever being asked me.

Q. Was not my next question, "If any one went to catch the team, who was it?" and didn't you answer, "I think it was Mat.—Mat., the blacksmith?" You remember that, do you not?

A. I don't remember him hollowing to Mat. to catch the horses. I told you I remembered hollowing either to Mat. or the hack; I would not be positive which; but in regard to him hollowing to Mat. to come and catch the horses, I don't remember any such question being asked. I don't know that I answered to such a question.

Q. Do you swear you did not?

A. I don't remember swearing to any such question as that.

Q. Will you swear you did not answer that question that way?

A. I will; I will have to swear I don't remember any such question.

Q. "Did you know him at the time?" "A. No; he called the gentleman, then I knew it was Mr. Elwood after he spoke."

A. Yes, sir.

Q. "Did you see him come to catch the horses?" "A. I seen him; I did not know who he was." Is that right?

A. I don't remember ever swearing to any such question as that.

Q. "You heard this gentleman that was lying on the ground moaning?" "A. Yes, sir; I heard him." Is that right?

A. I don't remember any such question being asked me about his moaning.

Q. Will you swear positively you did not say so?

A. I will swear I don't remember any such question being asked me.

Q. Was not the next question, "Moaning pretty loud?" and
213 did you not answer, "Well, it was about 120 feet from there?"
Do you remember that?

A. It might be 120 feet.

Q. Did you swear that way on the other trial?

A. I don't remember any such question being asked me in regard to 120 feet or 150 feet, or hearing a man moan or groan. It may have been asked me. I am not positive in regard to that.

Q. What do you say now—did you hear a man moan in the street?

A. No, sir; I don't think that I did.

Q. Will you swear you did not?

A. I am not positive whether I heard him or not, or whether that question was ever asked me before.

Q. You are not positive whether you heard that man moan in the street or not?

A. I am not. I don't remember that question being asked me before.

Q. Will you swear that question was not asked you?

A. I will swear, to the best of my knowledge, I don't remember that question being asked me.

Q. Was not the next question asked you, "What did you do?" and did you not answer, "I did not do anything?"

A. I don't remember that question being asked me.

Q. Do you say it was not asked you, and that you did not answer it that way?

A. Well, I say it was not asked; I don't remember that question being asked me. I will swear, to the best of my knowledge, I don't remember that question being asked me.

Q. Were you not asked, "You supposed the person was hurt?" and did you not answer, "Yes, sir?"

A. I don't remember.

Q. Will you swear you did not answer that question?

A. I tell you I would not swear to it. To the best of my knowledge, I don't remember such a question being asked me.

Q. If it was asked you then, did you answer it in that way?

A. I can't tell you whether I did or not.

214 Q. You did suppose somebody was hurt, did you not?

A. I did not suppose anything about it.

Q. Did I not ask you next, "Why did you not go out and help him," and did you not answer, "I seen there was enough there without me?"

A. I believe I did. To the best of my memory, I believe you asked me that question.

Q. Did I not ask you next, "Mr. Elwood was the only man there, was he not?" and did you not answer, "Mr. Elwood was there and Mat. was there. Mat. was the man that catched the team?"

A. I might have said that.

Q. Did you?

A. To the best of my knowledge.

Q. To the best of your knowledge, you did?

A. Yes, sir.

Q. The next question, "He was not near Mr. Elwood nor Mr. King, was he?" and you answered, "I don't know how near to them he was."

A. Yes, sir.

Q. Was not the next question, "Well, you could not see, could you?" and you answered, "He was not in the buggy."

A. I don't remember that question being asked me.

Q. "Answer the question. He was not near them, was he?" and you answered, "He was not on the sidewalk when it happened" (speaking of Mat.)

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. Then you knew Mat. was there and where he was?

A. I knew Mat. must be somewhere around there; Mr. Elwood hollowed to him.

Q. You knew he was on the sidewalk?

A. I supposed he must be on the sidewalk.

Q. You supposed he was on the sidewalk?

A. I don't remember testifying he was on the sidewalk.

Q. You said a moment ago you did.

A. No, you asked me if I remembered him being there. I
215 told you I remembered Mr. Elwood hollowing to the hack or to Mat.

"Q. He was not near them, was he? (speaking of Mat.) and you answered, "He was on the sidewalk when it happened." That is right, is it not?

A. Yes, sir.

"Q. You stood there and saw it, heard this man moan, and never went near him?" "A. No, sir; I never left the gate."

A. I don't remember any sich question as that.

Q. Will you swear that question was not put to you just in that language?

A. I do not swear it was not put to me, but I don't remember answering any such question. I swear I don't remember swearing to any such question.

Q. Was not the next question, "What did you do?" and did you not answer, "I stood over there, right in the gate."

A. Yes, sir; I stood at the gate.

Q. You answered that question that way, did you not?

A. Yes, sir; that I stood at the gate.

Q. You answered that question as I have read it now, "I stood over there, right in the gate." "Q. Kept standing there?" "A. I did, sir."

A. Yes, sir.

"Q. Did anybody come to their assistance?" "A. I believe there was." Is that so?

A. Yes, sir.

"Q. Who was it?" "A. I don't know only this man, Mat." Is that so?

Q. When did you first hear of the accident—what time of night was it?

A. I can't understand that right.

Q. Where were you when you heard somebody was injured in front of Rosenfeld's block?

A. Oh, it was a pile outside of Rosenfeld's block.

Q. Who told you that some one was hurt?

A. I seen a pile at the side of the street; brick, sand, and mud and lime was at the side of Rosenfeld's block on the street.

Q. When did you see that?

A. I seen it about November, 1879.

Q. On this night of the accident what lights, if any, did you see?

A. I saw a light at the lime box, hanging up there, and a light from the corner of Johnson and Bank streets, a gas-light, and Mr. Schuepbach kept a light right in the windows of the saloon. That is the light what I saw.

Q. What time of night did you see it?

A. Well, it was about eight o'clock—seven or eight o'clock—the same night I comes up from River street with Jake Kohli; a light hangs up there on a pole at the side of the lime box; there was a pole on there and a light hangs on that. I comes up there and goes back in the saloon, and in about five or ten minutes afterwards a man comes in and said——

Q. What did you do after the man came in?

219 A. I went in the saloon and read a paper there.

Q. Did you go out again that night?

A. No.

Q. What did you do?

A. I read a paper—German paper.

Q. Did you read it all night?

A. I went to bed.

Q. How long did you read it?

A. About five minutes.

Q. What did you do then?

A. A man comes in——

Q. A man came in and said something. Then what did you do?

A. I went into the door to look after——

Q. What did you do at the door?

A. A man say a buggy runs into the pile and I went to the front door to look at it.

Q. What did you do when you went to the front door?

A. I seen the buggy runs up Bank street, towards Superior street.

Q. How far was that buggy away?

A. Well, it was away about a hundred feet from the pile.

Q. It was going away was it?

A. Yes, sir.

Q. Did you notice any lights then?

A. This light—it was there after and before—five minutes before and after.

Testimony of Thomas McMahon.

THOMAS MCMAHON, called on behalf of the defendant, being sworn, testified as follows:

Q. What is your business?
A. Expressman.
Q. What was your business in the fall of 1879?
A. Expressing.
Q. Where did you live?
A. 400 Norwood avenue.
Q. Do you remember the accident that occurred on Bank street, in front of Rosenfeld's block, in November, 1879?
A. Yes, sir.
Q. Do you remember where you were on the evening that that accident occurred?
A. Yes, sir.
Q. Where were you?
A. In Mr. Fred. Schott's store, on Bank street.
220 Q. State if you saw any building material in the street that night in front of Rosenfeld's block.
A. Yes, sir; there was some building material in the street.
Q. You saw some there?
A. Yes; before and after.
Q. State what lights, if any, you saw about that building material that evening.
A. I didn't see no light on the building material that evening.
Q. How late were you there?
A. In the neighborhood of five o'clock, I should think—maybe half past four.
Q. You went away then?
A. Yes, sir.

Counsel on behalf of defendant then offered in evidence the time table for lighting the gas-lamps of the city of Cleveland for the month of November, 1879, which is follows:

221 1879. *Time Table for Lighting and Extinguishing*

Day of month.	Jan.			Feb.			March.			April.			May.			June.		
	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.
1	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
2	x	...	...	x	...	...	x	...	...	x	...	...	x	..	...	x	...	...
3	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
4	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
5	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
6	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
7	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
8	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
9	x	...	...	x	...	...	x	...	...	x	...	...	x	..	...	x	...	...
10	x	...	...	x	...	..	x	...	...	x	...	...	x	...	...	x	...	...
11	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
12	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
13	x	...	...	x	...	...	x	...	..	x	...	...	x	...	...	x	...	...
14	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
15	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
16	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
17	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
18	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
19	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
20	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
21	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
22	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
23	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
24	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
25	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
26	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
27	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
28	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...	x	...	...
29	x	...	...	...	...	...	x	...	...	x	...	...	x	...	...	x	...	...
30	x	...	...	...	...	...	x	...	...	x	...	...	x	...	...	x	...	...
31	x	...	...	...	...	...	x	...	...	x	...	...	x	...	....	x	...	...

the Street Lamps for the Year 1879. 1879.

July.			August.			September.			October.			November.			December.			Day of month.
Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	Lt.	Ex.	Hrs.	
x	x	x	x	x	x	x	x	x	x	x	x	5.15	6.45	1.30	4.45	7.15	2.30	1
x	...	...	x	...	...	x	...	...	x	...	...	5.15	7.30	2.15	4.45	8.15	3.30	2
x	...	...	x	...	...	x	...	...	x	...	...	5.15	8.15	3.00	4.45	9.15	4.30	3
x	...	...	x	...	...	x	...	...	x	...	...	5.15	9.15	4.00	4.45	10.15	5.30	4
x	...	...	x	...	...	x	...	...	x	...	...	5.15	10.15	5.00	4.45	11.30	6.45	5
x	...	...	x	...	...	x	..	...	x	...	...	5.15	11.30	6.15	4.45	12.30	7.45	6
x	...	...	x	...	...	x	...	...	x	...	...	5.00	2.15	7.15	4.45	12.30	7.45	7
x	...	...	x	...	...	x	...	...	x	...	...	5.00	12.30	7.30	4.30	1.45	9.15	8
x	...	...	x	...	...	x	...	...	x	...	...	5.00	1.45	8.45	4.30	3.00	10.30	9
x	...	...	x	...	...	x	...	...	x	...	...	5.00	2.45	9.45	4.30	4.15	11.45	10
x	...	...	x	...	...	x	...	...	x	...	...	5.00	4.00	11.00	4.30	5.30	13.00	11
x	...	...	x	...	..	x	...	...	x	...	...	5.00	5.15	12.15	4.30	6.30	14.00	12
x	...	...	x	...	...	x	...	...	x	...	...	5.00	5.45	12.45	*4.30	6.30	14.00	13
x	...	...	x	...	...	x	...	...	x	...	...	5.00	5.45	12.45	4.30	6.30	14.00	14
x	...	...	x	...	...	x	...	...	x	...	...	5.00	5.45	12.45	4.30	6.30	14.00	15
x	...	...	x	...	...	x	...	...	x	...	...	6.15	5.45	11.30	7.30	6.30	11.00	16
x	...	...	x	...	...	x	...	...	x	...	...	7.30	6.00	10.30	8.30	6.30	11.00	17
x	...	...	x	...	...	x	...	...	x	...	...	8.30	6.00	9.30	9.45	6.30	8.45	18
x	...	...	x	...	...	x	...	...	x	...	...	9.45	6.00	8.15	10.45	6.30	7.45	19
x	...	...	x	...	...	x	...	...	x	...	...	11.00	6.00	7.00	12.00	6.30	6.30	20
x	...	...	x	...	...	x	...	...	x	...	...	12.00	6.00	6.00	12.00	6.30	6.30	21
x	...	...	x	...	...	x	...	...	x	...	...	12.00	6.00	6.00	1.00	6.30	5.30	22
x	...	...	x	...	...	x	...	...	x	...	...	1.00	6.00	5.00	2.00	6.30	4.30	23
x	...	...	x	...	...	x	...	...	x	...	...	2.00	6.00	4.00	3.00	6.30	3.30	24
x	...	...	x	...	...	x	..	...	x	...	...	3.00	6.00	3.00	4.00	6.30	2.30	25
x	...	...	x	...	...	x	...	...	x	...	...	4.00	6.00	2.00	4.45	6.30	1.30	26
x	...	...	x	...	...	x	...	...	x	...	...	...	...	...	...	...	...	27
x	...	...	x	...	...	x	...	...	x	...	...	...	...	...	...	...	...	28
x	..	...	x	...	...	x	...	...	x	...	...	...	...	...	...	...	...	29
x	...	...	x	...	...	x	...	...	x	...	...	...	...	...	5.00	7.15	2.15	30
x	...	...	x	...	...	x	...	...	x	...	...	...	...	...	5.00	8.15	3.15	31
														189.30	...	...	212.15	

222 To the admission of which the plaintiff objected. The court overruled said objection and admitted said time table in evidence; to which ruling and decision of the court the plaintiff then and there excepted.

WILLIAM LINE, a witness on the part of the defendant, being duly sworn, testified as follows:

(By Mr. SHERWOOD:)

Q. You are the United States signal officer stationed here in Cleveland?

A. Yes, sir.

Q. Have you the records of observations taken on the 12th of November, 1879?

A. I have. (Witness here produced a book.)

Q. I wish you would state the times of your observations on that date, in the evening and afternoon, and tell us what the weather was.

A. (Referring to record book.) 7 a. m., 2 p. m., 9 p. m.; telegraphic, 6.42 a. m., 2.42 p. m., and 10.42 p. m.—that is, to correspond with Washington time. The weather at 2 p. m. on the 12th of November, 1879, was cloudy; at 9 p. m. it was clear; at 10.42 p. m. it was clear.

Q. Have you anything later than that?

A. No, sir.

Q. State about rain on that day.

A. Sixteen-one-hundredths of an inch fell up to 2.42 in the afternoon, and at night there was about an half an inch, $\frac{58}{100}$, at 11 o'clock. It commenced at three o'clock and ended at 6 p. m. A little over an half an inch fell.

Q. How was it about clouds at the date of this observation?

A. There were no upper and no lower clouds; there were no clouds at all. It is divided into upper and lower clouds. There were none.

Q. No clouds at all at what observation?

A. This observation is at 10.42. At 10.42 it was clear, no clouds.

Q. And at 9 what was the condition?

A. No clouds, clear.

Q. And you have no observations between 2 and 9, of that date?

A. No, sir; there is the 2.42, of course; that is telegraphic observation.

223 Q. What does that mean?

A. There is eighteen minutes' difference between Cleveland and Washington.

Q. Does that mean that you telegraph from here to Washington?

A. Yes, sir; it takes three observations to correspond with Washington time at all signal stations.

Q. Was there any observation of any kind taken between 2.42 and 9 p. m.?

A. No, sir; I think not; there is no record of it here.

Q. You took an observation as to rain, and say that it commenced at three p. m. and ended at six?

A. Yes, sir; that is the time placed down here—commenced at 3 p. m. and ended at 6. There was no observation of instruments taken between the telegraphic observation and the 9 p. m. observation—that is, from the record here.

Cross-examination by Mr. WILCOX:

Q. I simply want to ask you one question, and that is what the temperature was in the afternoon.

A. At 2.42 it was 72.

Section 6, chapter 59, on page 219 of City Ordinances of the City of Cleveland, was here offered in evidence on behalf of the defendant, of which the following is a copy:

SEC. 6. No person shall ride or drive any horse or horses or other animals in such a manner as to endanger or unreasonably incommode any person, or at a rate of speed exceeding six miles an hour: Provided, however, that the board of improvements may designate streets or avenues upon which horses may be speeded for amusement or exercise at any rate of speed. The board of improvements, upon designating any street upon which driving at a rate of speed exceeding a rate of six miles per hour shall be allowed, shall notify the superintendent of police, naming the street and the length of time for which the permission is granted.

224 And the plaintiff, further to maintain the issues on his part and by way of rebuttal, introduced the following testimony:

Testimony of David McClasky.

DAVID MCCLASKY, called on behalf of the plaintiff, being duly sworn, testified as follows:

(By Mr. WILCOX:)

Q. What is your business?

A. Proprietor of the Kennard House.

Q. What was your business in November, 1879?

A. The same.

Q. Do you rem-ber an accident that happened to Mr. Henry King in November, 1879?

A. I do.

Q. When did you see Mr. King after the accident?

A. I saw him when he was brought to the hotel. One of the porters came to me and announced that Mr. King was in a carriage.

Q. Where did you see him?

A. I saw him in the carriage.

Q. Did you go out to the carriage?

A. I did.

Q. What kind of a carriage was he in?

A. It was what we call a hack carriage—double carriage—not a buggy.

Q. Do you know to whom that carriage belonged?
A. I understood it was the Omnibus Company's carriage.

Testimony of John Fairfax.

JOHN FAIRFAX, called on behalf of the plaintiff, being sworn, testified in rebuttal as follows:

Q. What was your business in November, 1879?
A. Bell boy at the Kennard House.
Q. Do you remember an accident to Mr. Henry King that night?
A. I do, sir.
Q. Where did you see Mr. King after the accident, first?
A. First, I was standing near the door, the carriage drove up to the door, and I ran out, sir.
Q. Was he in the carriage?
A. Yes, sir.
Q. What kind of a carriage was it?
A. It was a regular carriage—regular hack carriage.

225 And the foregoing was all the testimony or other evidence to the jury by either or both parties to said cause. Whereupon the court charged the jury as is set forth in the following full report thereof, to wit:

Charge.

GENTLEMEN: The plaintiff in his petition sets out as his cause of action against the defendant that on the 12th day of November, 1879, it wrongfully placed divers large quantities of dirt, sand, rubbish, stone, boxes, and other materials for building purposes in and across Bank street, in the city of Cleveland, at or near a certain building on the east side of said street, and negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stone, boxes, and other materials to extend across and occupy more of the said street than was reasonable and necessary, to wit, more than one-half of the width of the street, and to remain and continue therein on the said 12th day of November, 1879, and during the night time of that day; that defendant wrongfully and negligently suffered and permitted said dirt, sand, rubbish, stone, boxes, and other materials to so remain and continue in and across said street during the night time of the said 12th day of November, 1879, and after dark, unprotected and unguarded with a sufficient number of lights or in such a manner as to be distinctly seen by those who might be passing, and the same was permitted to remain without any signal or light to guard the same or denote the same was there; that in consequence of the carelessness, negligence, and improper conduct on the part of the defendant the plaintiff, while lawfully passing along said street in the night time of the said day, in a certain carriage drawn
226 by horses, was then and there, by reason of said dirt, sand, rubbish, stone, boxes, and other materials so allowed to be

and remain in said street as aforesaid, overturned with great force and violently thrown upon said street, and one of the plaintiff's legs was thereby broken and otherwise bruised and injured without any fault or negligence on his part; by reason of which he has sustained damages, and he asks judgment for the damages he has sustained thereby.

These allegations are denied by the defendant, and it also says that the plaintiff was injured by his own negligence and not by reason of the want of care of the defendant.

This issue you are to determine from the evidence in the case, under the direction of the court as to the questions of law involved therein.

This suit is founded upon a charge of negligence on the part of the defendant. To maintain his action the plaintiff must establish substantially the negligence charged against the city in his petition, and it must also be shown in the whole evidence that the plaintiff did not by his own negligence and carelessness contribute to the injury; and if it appear that the defendant was guilty of the negligence charged against it, yet if the plaintiff was himself guilty of such negligence as that the injury would not have occurred without that carelessness and negligence on his part, then the plaintiff is not entitled to recover.

It will be important for you, before proceeding to investigate and determine the questions of fact growing out of this issue, to know what in law is understood to be negligence for which an action may be maintained against a party guilty of such negligence.

Negligence is a failure to do what a reasonably prudent person would ordinarily do under the circumstances of the
227 situation, or in doing what such a person under existing circumstances would not do. Carelessness and negligence are relative terms. What might be negligence under some circumstances or at some time or place may not be so under other circumstances or at another time or place. Reasonable and proper care must have reference to surrounding circumstances. They may often demand a higher or lower degree of care and diligence of a party called upon to act. Negligence is a question of law, and of fact. The duty of a party is a question of law, and what was done by a party is a question of fact. The court settles the former and it is your province to settle the latter. It is, then, important to understand the rights and the duties of the plaintiff as well as of the defendant. The plaintiff had the right to the use of the street, in going from the hotel to the depot, unobstructed and free from danger, but subject, however, to such incidental, temporary, or partial obstructions as are necessarily occasioned in the building or repair of houses fronting upon the streets over which he passed; but in using the street he must exercise reasonable and ordinary care to avod obstructions, if any be found therein. In the night time he had the right to suppose, in the absence of signals of danger, that the street was not dangerously obstructed or dangerous to pass over; but in passing over it he must exercise ordinary care and prudence to avoid any dangerous obstructions, both in the observation of obstructions,

their locality and character, and the speed used in passing along the street. If any obstructions attracted his attention he should be more careful to avoid any others that might be in the street and near the same, or if he knew that there were building materials located in the street in front of a new building, in driving along he must exercise reasonable care to avoid running upon any
228 such obstructions. The city had a right to allow Rosenfeld to use a reasonable part of the street for the purpose of depositing therein building materials with which to erect his building, and the same could rightfully be used by Mr. Kostering, the builder or contractor, for that purpose.

Defendant had the right to prescribe terms and conditions that would be reasonable and proper to secure the safety of persons passing along the street, and, among other things, to require such owners or contractors, in the night time, to place signal lights at or near the obstructions sufficient to warn those passing of danger in so passing. Without any permit to do so, — owners of lots abutting directly on streets in a city like Cleveland has the right to the use of a reasonable or necessary part of the street on which to deposit building materials in the erection of his building, and the city could not prevent him from such reasonable use, but he must comply with reasonable requirements made by the city to provide for the safety of persons using the street. Having allowed Mr. Rosenfeld and the contractor, by permits granted in the usual way, to use one-half of the street on which to deposit necessary building materials, with a provision therein as to proper signals, as stated, and such building materials being in the street at the time the plaintiff alleges he received the injury of which he complains, the question arises, What was the duty of the city in seeing that proper guards and proper lights were placed at or near the materials so deposited?

The principal negligence complained of by the plaintiff is that, being in the night time, no lights were placed at or near the materials sufficient to warn him of danger as he passed along the street. Having provided in the permits to Rosenfeld and Kostering,
229 the contractor, that in the night time sufficient lights should be placed by them at or near materials placed and remaining in the street to warn persons passing along there of dangerous obstructions, the city had a right to suppose such lights were so placed in the night time. Whilst it was the general duty of the city to keep its streets in safe condition for the use of persons passing over the same, and liable for injuries caused by its neglect or omission to keep them in repair and reasonably safe, yet in such a case, the basis of the action being negligence, it is not liable for an injury resulting from such negligence unless it had notice or knowledge of the defect that caused the injury before it was sustained; or, in the absence of express or direct notice, such notice or knowledge may be inferred from facts and circumstances showing that such want of proper lights to denote dangerous obstructions existed for a sufficient period of time and in such a public and notorious manner as that the officers representing the city or those in the employment of the city for the purpose of removing obstructions in the city, in

the exercise of ordinary care and diligence, ought to have known of such want of proper guards in the night time.

The city is not an insurer of the absolute safety of persons passing along its streets in the night time. It is only required to exercise ordinary care for such safety, and in judging of what would be ordinary care you are to take into account the great number of streets and their mileage contained in the city. If the city or the officers or employees representing it had such notice or knowledge, direct or implied, as I have stated, then it was its duty to see that proper lights in the night time were placed at or near the obstruc-
230 tions, such as would be sufficient to warn persons of reasonable and ordinary prudence of the presence of such obstructions, and, failing to do so, it would be liable for injuries resulting from such failure.

It will be important, then, for you to ascertain the character of the obstructions and what lights were placed at or near them, or what other lights were near there in the street at the time the plaintiff received the injury of which he complains. Was there a sufficient, reasonable, or proper light or lights placed at or near the obstructions? The plaintiff says there was no light there, and the defendant claims a suitable and proper light was placed there and was there at the time of the injury.

The plaintiff must establish his allegations by a fair preponderance of the proof. This being a question of fact, you must determine it from a careful consideration of all the evidence.

Then, if you find that no proper lights were there at the obstruction, you must ascertain whether the defendant had notice or knowledge of such failure of light or ought to have known of such failure, as I have before stated to you. If you find no such notice or knowledge of the defendant is established by the evidence, the plaintiff is not entitled to recover in this action.

Bearing upon the question of the care or want of care of the plaintiff in passing along the street, it will be important for you to ascertain the kind of a night it was—whether dark or otherwise, the character of the lights, if any, surrounding or adjacent to the place at which the injury was sustained, and if, under the evidence, the plaintiff is shown to have contributed to or occasioned the injury by his own carelessness, he is not entitled to recover; or if you
231 find that the injury was occasioned solely by the carlessness of the driver, Elwood, the defendant cannot be held liable for the injury thus produced. If the driver's negligence only contributed to the injury, his negligence cannot be attributed to the plaintiff and must not be regarded as the plaintiff's negligence, so as to defeat his action, where the negligence of the defendant directly contributed to the injury.

In settling questions of fact, when there is a conflict of evidence it is your duty to reconcile such conflict, if you can, and from all of the evidence ascertain the truth. One of the most difficult duties of courts and juries is to determine and find the truth in such conflict of testimony. The law has wisely laid down certain tests of credibility to be applied to witnesses to aid in finding the truth

of their testimony, and among them are these: The manner of the witness on stand. You have the witness generally before you and can see the manner in which he gives his testimony. The intelligence of the witness or his knowledge of the subject-matter about which he swears, and the means of his knowledge. The care and attention which the witness may have given to the occurrence about which he may testify; so the interest of the witness in the subject-matter about which he swears or his interest in the result of the suit, or his feeling in regard to the parties. Then the probability of the statements of the witness. Would such things occur in the ordinary transactions of life? Where the statement is improbable it would require corroboration to believe the statement. Is the witness corroborated or contradicted by other witnesses? Has the witness told other stories to other parties or sworn differently on other trials about the same subject-matter? Is the witness of good character or is he impeached? All witnesses are presumed to have good character for truth unless impeached.

232 Now apply these tests to the evidence in this case and, as it is your duty, find the truth from the evidence. If you find the defendant not guilty of the negligence charged, you will return a verdict for the defendant. If you find, however, for the plaintiff you will assess such reasonable amount of damages as, in your opinion, he is entitled to recover. The amount of damages is entirely within your control. The law lays down several elements that may be taken into account in such assessment, such as the loss of time occasioned by the injury, the bodily and mental suffering, expenses of doctor bills and nursing, diminished capacity to attend to business, and the permanent disability occasioned by the injury, if such be made to appear.

Now, gentlemen, take this case, and under these general directions examine all of the evidence and make such a finding as will satisfy you of having done right and justice between the plaintiff and the defendant, the city.

Whereupon said defendant, by its counsel, requested the court to charge as follows:

Mr. SHERWOOD: I would ask the court to charge that there is not sufficient legal evidence of negligence on the part of the defendant, its officers or agents, in this case to entitle the plaintiff to recover, and the verdict should be for the defendant.

But the court declined to charge as requested, and to said refusal of the court to charge as requested defendant then and there excepted.

Whereupon, the jury having rendered a verdict for the plaintiff, the defendant filed a motion for a new trial for the reasons set forth therein, and tendered to the court this its bill of exceptions, which it prays may be allowed and which is accordingly done, and on defendant's motion is ordered to be made a part of the record in this case.

M. WELKER. [SEAL.]

233 And afterwards, to wit, on Monday, February 1st, A. D. 1886, being a day of the October term, A. D. 1885, of said circuit court—present, Judge Welker—the following order was issued in said cause in said court, viz:

HENRY KING
vs.
THE CITY OF CLEVELAND.

This day come the parties, by their counsel, and upon application of the defendant the hearing of the motion to set asid- the verdict filed at a former day of this term of court and for a new trial of said case is continued until the next term of court; and thereupon came the defendant and presented its bill of exceptions as to errors and irregularities of the court during the trial of this case at the present term, which is, upon application of defendant, signed and sealed and ordered to be made part of the record of the case.

And afterwards, to wit, on Thursday, March 25th, A. D. 1886, being a day of the February term, 1886, of said court—present, the Honorable Judge Welker—the following judgment was entered in this cause in said court, viz:

HENRY KING.
vs.
THE CITY OF CLEVELAND.

This day came the parties, by their attorneys, and came on to be heard the defendant's motion to set aside the verdict heretofore rendered by the jury and for a new trial herein, and the same was argued by counsel; and thereupon, upon consideration, it is ordered that said motion be overruled; and thereupon, on motion of plaintiff's attorneys, it is considered that said plaintiff, Henry
234 King, have and recover from the said defendant, The City of Cleveland, the sum of ten thousand one hundred and ninety-five ($10,195.00) dollars, being the amount of the verdict as heretofore rendered at the October term of this court, together with interest to the first day of this term, and that said sum of $10,195.00 bear interest from the 2nd day of February, 1886; and it is also considered that said plaintiff have and recover from the defendant, The City of Cleveland, the costs of this suit, to be taxed at $——, for which execution may issue; to which defendant excepts.

235 Know all men by these presents that we, The City of Cleveland, as principal, and George W. Gardner & Allen T. Brinsmade, as sureties, are held and firmly bound unto Henry King in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to the said Henry King, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at the February term, A. D. 1886, of the circuit court of the United States for the northern district of Ohio, eastern division, in a suit depending in said court between Henry King, as plaintiff, and the said City of Cleveland, defendant, a judgment was rendered against the said City of Cleveland in the sum of ten thousand dollars ($10,000.00), and the said City of Cleveland having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Henry King, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said City of Cleveland shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good,
236 then the above obligation to be void; else to remain in full force and virtue.

THE CITY OF CLEVELAND, [SEAL.]
Per GEO. W. GARDNER, *Mayor.*
GEO. W. GARDNER. [SEAL.]
ALLEN T. BRINSMADE. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
M. WELKER,
District Judge U. S., Northern District of Ohio.

Approved & filed May 22, 1886.

A. J. RICKS,
Clerk U. S. Circuit Court.

237 *Certificate.*

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Henry King is the plaintiff and The City of Cleveland is the defendant, as the same appears from the files and records of said court now in my custody.

Seal of the Circuit Court, North'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, this 22nd day of June, A. D. 1886, and in the 111 year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 361. The City of Cleveland, plaintiff in error, *vs.* Henry King. Filed September 23d, 1886.

In the Supreme Court of the United States.

THE CITY OF CLEVELAND, *Plaintiff in Error*,

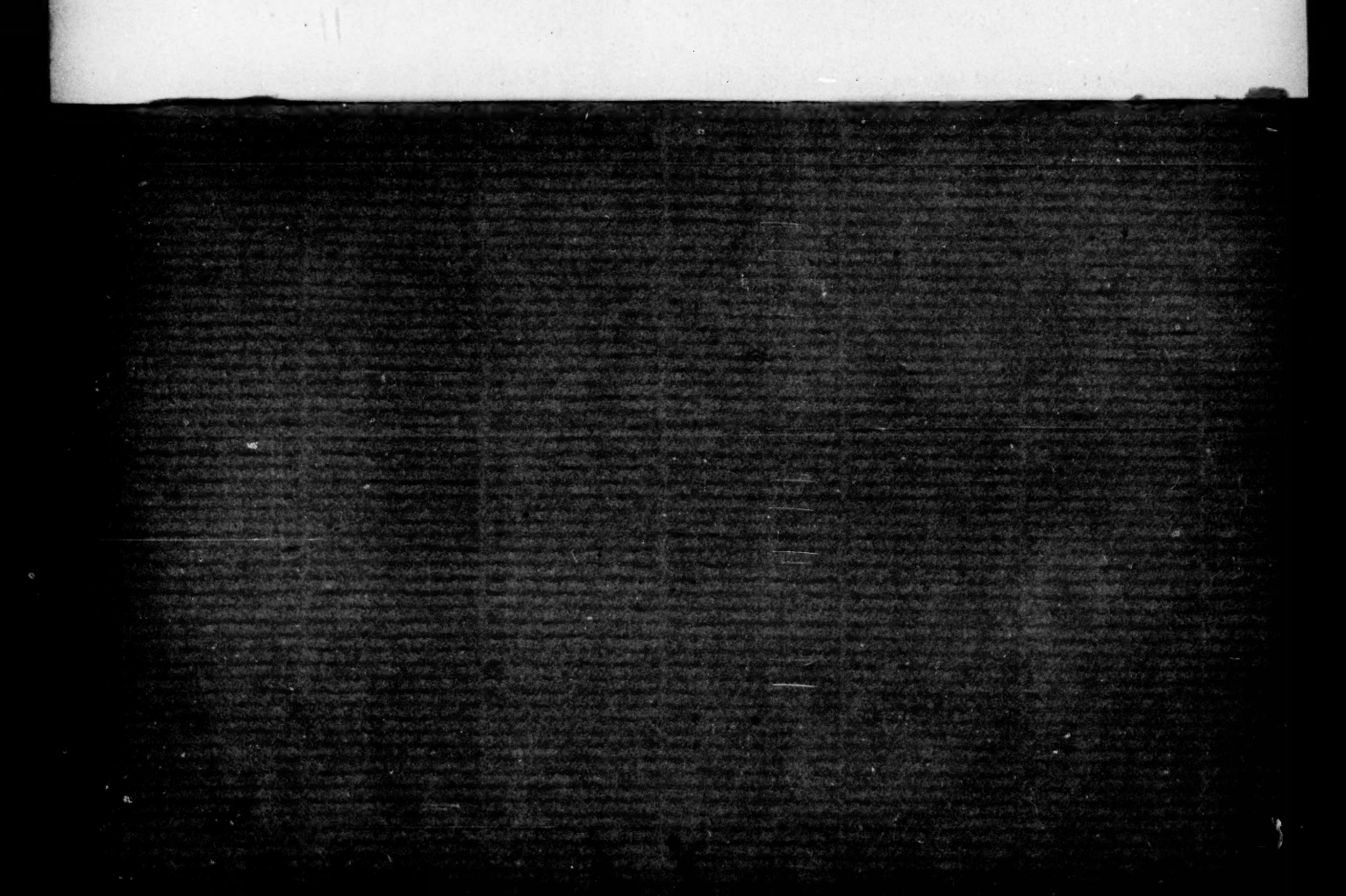
vs.

HENRY KING, *Defendant in Error*.

BRIEF FOR PLAINTIFF IN ERROR.

ALLAN T. BRINSMADE,

Attorney for Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

THE CITY OF CLEVELAND,
Plaintiff in Error,

vs.

HENRY KING,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The original action was brought in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, by the said Henry King against the City of Cleveland, to recover damages for an injury by him received in being thrown from a buggy while driving along one of the streets of said City.

STATEMENT OF FACTS.

On the 12th day of November, 1879, plaintiff, King, who was a citizen of the State of Pennsylvania, being in Cleveland, started, about 7 o'clock in the evening, with one

Elwood, a liveryman, to go, in the buggy of the latter, from the Kennard House, a hotel at the corner of Bank and St. Clair streets, northerly on Bank street to the Union Depot.

While driving along said street, and at a point about 300 feet from the place of starting, the buggy collided with some building material which had been placed in the street by a man who was engaged in the erection of a three story brick block, on an abutting lot under contract with the owner, one E. Rosenfeld, and King was thrown out and severely injured.

King bases his action for recovery on the ground of negligence.

The specific charges of negligence are as follows (see allegations of petition, printed record page 10): 1st. "That the defendant" (the City) "well knowing the premises" (i. e., that Bank street was a public street and highway) "wrongfully placed and permitted to be placed, divers large quantities of dirt, sand, rubbish, stones, boxes and other material for building purposes in and across said street, at or near and before a certain building, abutting on the East side of said street, being No. 56, and then owned by one E. Rosenfeld, and

2nd. "Negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stones, boxes and other material to extend across and occupy more of said street than was reasonable and necessary, to wit, more than one half of the width of said street, at the place aforesaid, and to remain and continue therein on the said 12th day of November, 1879, and during the night time of that day."

3rd. "That said defendant negligently and wrongfully suffered and permitted said dirt, sand, rubbish, stones, boxes and other materials to so remain and continue in and across said street during the night time of said 12th day of November, 1879, and after dusk, unprotected and unguarded with a sufficient number of lights, or in such manner as to be distinctly seen by those who might be passing; and in fact the same was permitted to remain without any signal or light to guard the same or to denote that it was there." The questions involved on the case are:

1st. Is the City of Cleveland liable for accidents arising from the wrongful or improper placing of building material in one of its streets, or the improper or insufficient guarding of such material therein, by persons not officers or agents of the City or subject to its direction or control?

2nd. Does the petition of plaintiff below, state facts sufficient to constitute a cause of action against defendant below?

3rd. Will constructive notice, to the City, of the non-existence, on a particular night, of proper lights or guards about building material, placed in one of its streets by a third person; or that such material was on that night extended into the street further than was reasonable or necessary, be presumed from the fact that such material had been in the street for some time prior thereto; especially when it does not appear but that at all times previously it had been properly guarded and protected, and had been confined within reasonable and proper limits?

4th. When the petition alleges the wrongful placing and existence of the material in the street on a particular day and

night, can proof be offered, against objection, of its existence at that place for some time prior to that day and night for the purpose of proving constructive notice to the City?

ASSIGNMENT OF ERROR.

Plaintiff in error avers that there was error in the record and proceedings of said Circuit Court in this to wit:

I. The Court erred in admitting any testimony in behalf of plaintiff below against the objection of defendant below.

See printed record, page 15.

II. The Court erred in admitting certain evidence offered by plaintiff below to which defendant objected to wit:

(1). The permit from the Board of Improvements to E. Rosenfeld—dated July 16th, 1879—to occupy a portion of Bank street for the period of 60 days from date, for the purpose of placing building material thereon. (See original bill of Ex. p. 124, printed record, p. 88.)

(2). The permit from the Board of Improvements to Frank Kostering, dated Sept. 19th, 1879, to occupy a portion of Bank street for the period of 60 days from date, for the purpose of placing building material thereon. (See original bill of Ex. p. 124, printed record, p. 88.)

(3). The testimony of E. Rosenfeld in answer to the question as to how long the building material had been in the street. (Orig. bill of Ex. p. 133, printed record, page 94.)

(4). The testimony of Frank Kostering in answer to the question as to how long before the date of the accident to Mr. King there had been in the street obstructions of like character to that then existing. (Original record 135, printed record p. 96.)

The full substance of said testimony is as follows :

Ques. How long before that had there been obstructions of like character there ?

Ans. It was there during the time we done the brickwork and plastering.

Ques. How long did it take you to do the brickwork and plastering ?

Ans. I think it was in the latter part of October when we started the brickwork. First, when we done the basement understand, we had all the stuff in the basement ; we had nothing on the street, we hauled the stone right into the basement.

Ques. It was there during all the time you were doing the brickwork and plastering ?

Ans. Yes.

III. The Court erred in refusing the motion of defendant below to direct the jury to return a verdict for it, on the ground that no case had been made out against it, after plaintiff below had rested his case and before defendant had introduced any testimony. (See original record p. 135, printed record p. 96.)

IV. The Court erred in refusing to charge the jury as requested by defendants below, to wit : That there was not sufficient legal evidence of negligence on the part of the defendant, its officers or agents in this case, to entitle the plaintiff to recover, and the verdict should be for the defendant. (See record page 232, printed record 170.)

V. The Court erred in overruling the motion of defendant below for a new trial. (Original record, page —, printed record, p. 171.)

VI. The Court erred in rendering judgment for plaintiff below. (Printed record, p. 171.)

VII. The Court erred in not rendering judgment for defendant below. (Printed record, p. 171.)

VIII. The Court erred in other particulars apparent on the face of the record.

POINTS.

1st. The first error complained of is that the Court erred in admitting any testimony in behalf of plaintiff against the objection of defendant. (See printed record, p. 15.)

We contend, in the first place, that the City of Cleveland cannot be made liable in an action of this kind unless made so by statute.

"It is well settled that at common law a municipal corporation is not liable to an individual for neglect to keep a highway in repair whereby he suffers an injury in using it."

Cooley on Torts, p. 622, and cases cited.

"Towns are liable for damages suffered from defective ways only when an action is given by statute."

Frazer vs. Lewiston, 76 Me., 531.

Hewiston vs. Newhaven, 34 Conn., 136–139.

Hewiston vs. Newhaven, 37 Conn., 475.

For a thorough review of authorities and discussion of the principles involved see

Hill vs. Boston, 122 Mass., 344–380.

It is contended, however, in behalf of defendant in error, that the City is made liable by the Statutes of Ohio, to wit: Sec. 2640, Revised Statutes, Vol. 1, p. —.

This section reads as follows: "The Council shall have the care, supervision and control of all public highways, streets,

avenues, alleys, sidewalks, public grounds and bridges, within the corporation, and shall cause the same to be kept open, in repair and free from nuisance."

This section it is claimed imposes an absolute duty upon the City to keep the streets free from nuisances, and entails a liability for injuries resulting from a failure so to do.

The Supreme Court of Ohio has declared that this section only "requires a reasonable diligence in view of all the surroundings and does not exact that which is impracticable."

Chase vs. Cleveland, 44 O. S., 505–513–4.

The language of this section is broad enough to comprehend within its mandate, nuisances of every kind and description in any manner occurring within the public streets and highways; and it is equally mandatory, if mandatory at all, with respect to all nuisances. If, therefore, the city is liable by virtue of that provision of the statute, it is liable for injuries resulting from one class of nuisances as well as another. There can be no distinction drawn from the language of the act itself. But there are certain classes of nuisances which arise in public streets for an injury resulting from which no recovery can be had against the city. For example, the firing of cannon. Robison vs. Greenville, 42 Ohio St. 625; Mobs and rioting.

Medical College vs. Cleveland, 12 O. S. 375.

Thus we see that a liability on the part of the city is not fixed by this section of the statute. No cause of action can be founded on a violation of its provisions. It, like many other provisions, prescribes certain duties to be performed by the city, but affixes no penalty for a violation thereof.

The liability of the City, if any there be, for injuries from nuisances in the streets, arises from other considerations besides the statutory direction to keep them free from such. This liability depends upon the character of the nuisance and the relation which the City sustains to it. If the nuisance is one which requires the exercise of the police powers of the City, for its suppression, then for a failure to suppress it by the exercise of that power, the City cannot be held responsible.

This leads to a consideration of the character of the nuisance here complained of. It should be borne in mind, that notwithstanding section 2640 declares that the care, supervision and control of the streets shall be in the City Council, this does not give it absolute jurisdiction over them, or complete control of their use; for instance, the abutting property owner has a right to deposit building material in the street in front of his premises, and this he may do whether the City consents thereto or not.

Clark vs. Fry, 8 O. S. 358.

Dillon on Municipal Corporations, 3d Ed. Sec. 730.

In Clark vs. Fry, supra, it is held that the uses of the street in this manner "are not an invasion, but qualification of the right of transit on the public highway; and the limitation is that it must not be unnecessarily and unreasonably interposed or prolonged.

"Such temporary obstructions upon the highway, when guarded with due care to prevent danger to the public, and not unnecessarily extended or continued, are not nuisances, and do not require a license from the municipal authority to legalize them, although suitable regulations by the City authorities, requiring such obstructions to be properly guarded, and

to prevent them from being made in an improper manner, or continued unreasonably, are usual and highly proper."

We see therefore that whether the building material thus placed in the street is a nuisance or not, depends altogether upon the facts and circumstances surrounding the case, as, for instance, the size and character of the building, the width of the street, the opportunity to place them elsewhere than in the street. What is reasonable or unreasonable is therefore a matter of judgment to be exercised in the first instance by the abutting owner. Nor is it a judgment to be exercised with great nicety. It is only a palpable abuse which will subject the owner to liability. "There need be no absolute necessity; it suffices that the necessity is a reasonable one."

Dillon, Sec. 730, supra.

In what manner then can the City take cognizance of this abuse? If the municipal authorities should be of the opinion that for any reason the materials in the street exceeded the proper limitations, they could not abate them by summary proceedings. They could not, by simply declaring them a nuisance, make them such and proceed to remove them accordingly.

"While cities and towns have the right to abate nuisances, they have not the power to finally and conclusively determine, without notice or hearing, and without the right of appeal, that a given thing constitutes a nuisance. If the authorities of a town abate a supposed nuisance under the authority of an ordinance, they are subject to the same liability therefor as an individual, unless it be established that the property destroyed constituted a nuisance."

Cole vs. Kegler, 30 Albany Law Journal 194, 195.

Wood on Nuisances, Sec. 740.

City of Allegheny vs. Zimmerman, 95 Penn. St. 287.

Everett vs. Marquette, 53 Michigan, 450.

St. Paul vs. Gilfillan, 36 Minn., 298.

The fact as to whether or not they constitute a nuisance, must be determined by some Court in proper proceedings brought for that purpose, and the statute has provided how that fact may be determined, and prescribed a penalty for the creation and continuance of such nuisance.

Section 6921, Revised Statutes of Ohio, provides that, "Whoever.....obstructs or incumbers, by fences, buildings, structures or otherwise, any public ground, or highway, or any street, or alley of any municipal corporation, shall be fined not more than five hundred dollars.

Section 6919 provides, "In every case of conviction under section 6921 the Court shall adjudge that the nuisance described in the indictment be abated or removed and may issue an order to the Sheriff to execute such judgment at the cost and expense of the defendant.

Section 6920. "The continuance of any nuisance for five days after prosecution commenced therefor shall be deemed an additional offense."

This then defines what constitutes a nuisance, subject of course, to the limitations laid down by the Supreme Court in 8th Ohio St. 358, and shows that such nuisances are in violation of the police regulations prescribed by the State, and that the suppression thereof becomes a duty of the municipality as an arm and agency of the State.

This position is further strengthened by section 1934 of the Revised Statutes of Ohio which provides that, "the board

of police and the force hereby constituted shall, at all times of the day and night, within the boundaries of the City, preserve the public peace, prevent crime, arrest offenders, protect the rights of persons and property, guard the public health, preserve order, *remove nuisances existing in the public streets, roads, places and highways, report* all leaks or other defects in water pipes and sewers to the proper municipal authorities, provide a proper force at every fire, in order to protect strangers and travelers at steamboat and ship landings and railway stations, and *generally obey and enforce all ordinances of the City Council*, criminal laws of the State and of the United States."

If, therefore, this be a matter which comes under the police powers of the City, a matter of police regulation, to be enforced through the instrumentality of the police department, then the City cannot be held liable for a failure of that department to perform its duty.

" Police officers cannot be regarded as servants or agents of the City. Their duties are of a public nature and their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a public function, but this does not render such cities and towns liable for their unlawful or negligent acts.

Robison vs. Greenville, 42 O. S. 625.

Norristown vs. Fitzpatrick, 94 Pa. St. 121.

Medical Col. vs. Cleveland, 12 O. S. 375.

Campbell vs. Montgomery, 53 Ala. 527.

The following are all the provisions of the statutes of Ohio which concern nuisances in their relation to municipal corporations: Sec. 1692, ¶ 3 As to general powers of: 2116,

2128, 2129, 2130 and 2149 to 2152 inclusive, all of which relate to the powers and duties of the health department, in reference thereto. Section 1934, before cited, as to duties of police : 2640 as to duty of City Council.

It will be further observed, that the general power over nuisances granted by section 1692, ¶ 3 is not to abate summarily, but "to cause any nuisance to be abated." This, of course, means by methods prescribed by law. Nowhere is the power of summary abatement specifically given by statute, either to the City or any of its departments. Even the Board of Health, in cases involving the health of the City is required to give notice and have a hearing before it can order the abatement of a nuisance. See Sec. 2128.

The health department is operated under the police powers.

State, *ex. rel.* vs. Covington, 29 O. S. 102, 116.

It is especially to be noticed that there is not a particle of power to deal with nuisances granted to the City outside of that found among the police powers, and that there is nowhere any levy authorized for the suppression, abatement or removal of nuisances except it be found in the power to levy for the support of the police and health departments. This is different as to the other duties imposed by section 2640. Ample power is given to the City Council to deal directly with them, and power to provide funds therefor.

Section 1692, ¶ 18 of the Revised Statutes gives general power to open and repair streets. Section 2232 gives power to appropriate property for street openings. Section 2263 gives power to levy taxes to pay the cost and expense of street openings. Section 2683 gives power to levy for street repairs. The duty, and the power to perform that duty, by

authority to levy taxes or impose local assessments must both be conferred, or the corporation tax not be held liable.

2 Dillon. 3d Ed. Sec. 1017.

"A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets as by coasting.

LaFayette vs. Timberlake, 88 Ind., 330.

Altvater vs. Baltimore, 31 Maryland, 462.

In the latter case the Court held,

"The Board of Police Commissioners are not made authorities of the City of Baltimore by any provision of law. Although they exercise authority within the City for public purposes and objects, and to aid in maintaining good order therein, they have not derived their power from the corporation, nor have they been made amenable to the City for the faithful discharge of their duties."

"Amongst their other duties, they are specifically required 'to prevent and remove nuisances within the City.' A person, while passing along one of the streets of the City of Baltimore, was thrown down and injured by being run against by a sled going along the street at a rapid rate of speed."

"In an action against the City to recover damages for the injury, *Held* that the City was not responsible, inasmuch as it had no control over the Board of Police Commissioners, who had exclusive charge of the removal of the nuisance complained of."

The case of Sinclair vs. Baltimore, 59 Md., 592, was an action for an injury received in consequence of placing building material in the street, and is on all-fours with the case at

bar. There the Court say, that the case is ruled by the principle laid down in the Altvater case, and Hold:

"An ordinance regulating such obstruction is a mere police ordinance, intended to protect the streets against undue obstruction and the public in the right of travel.

"It manifestly belongs to that class of ordinances which require the agency of a police force to execute them and to see that they are observed, and if there be violations of their provisions that the penalties be enforced."

But if the City have no such police agency of its own, and is not allowed the direction and control of the police force within its limits, it has no means at its command to enforce the ordinance and it would therefore be unjust to hold it liable for injuries resulting from a failure to enforce the ordinance or regulation."

"By the police act of 1867, ch. 367, there is provided an independent police department for the City of Baltimore. That department does not derive its powers from, and have prescribed to it its duties by the municipal government. But the Board of Police Commissioners, clothed with the power of appointment of all subordinates are appointed by and derive their powers from the State and are therefore State officers. They are in no legal sense officers and agents of the City."

"The power of the City is confined to mere matters of regulation by proper ordinance, as to the manner and extent of the deposit of building material in the streets, and the enforcement of the regulation is entirely dependent upon a separate and independent police department over which the City has no control."

"An ordinance of the City required deposits of building material in any of the streets, lanes or alleys of the City to be designated during the night by displaying a lighted lamp or lantern at such part of the same as to be easily observed by persons passing along the street. In an action against the City to recover damages sustained by reason of a light so placed having been permitted to go out, it was *Held*, that the only ground upon which the City could possibly be held liable would be that the ordinance was not a reasonable and proper exercise of the authority delegated to the City for the regulation of the subject matter; that instead of lights some more effective signal of warning should have been required. That this ordinance or an ordinance like it had been in force for a good many years, and the Court were by no means prepared to say that if the terms of the ordinance were faithfully observed the signal required to be displayed would not be reasonable and sufficient."

"It is true the public have a right to the free passage of the streets, but yet that right can not at all times be enjoyed entirely free of obstructions."

"For purposes of improvement in cities and towns, streets from necessity must sometimes be, at least partially obstructed; and all that can be done to prevent accident is the deposit of the material in a reasonable place, and to place guards, or give reasonable precautionary signals to warn the public."

We have quoted largely from this case because of its parallelism to the case now before the Court and so completely represents the position of the plaintiff in error.

The independence of the Police Commissioners of the City of Cleveland and their complete control of the police force, is seen by reference to the following sections of the Revised Statutes of Ohio, viz:

Section 1926. "All police powers and duties connected with and incident to the appointment, regulation, and government of a police force, in cities of the second grade, of the first class, shall be vested in and exercised by a Board composed of the Mayor of such city and four commissioners."

Section 1927, provides for the election of Police Commissioners by the people.

Section 1929, provides that the Commissioners shall have exclusive power of appointment of members and officers of the force.

Sections 1930 and 1938, provides that the Commissioners alone can remove or suspend members of the force.

Section 1932, provides that the Board has entire control of police force.

Section 1939, provides that the Board shall fix the compensation and salary of officers and members of force.

Sections 1963 and 1978, provides that the City Council *shall* levy the amount estimated by the Board for annual expenses.

Second. But if a liability does exist, either at Common Law or under the Statutes, we then insist that the petition does not state facts sufficient to constitute a cause of action against the City.

The allegation that "defendant wrongfully suffered and permitted the material to occupy more of said street than was reasonable or necessary; and to remain and continue in and

across said street on the 12th day of November, 1879, during the night time, unguarded with a sufficient number of lights," etc., is the only allegation upon which notice to the defendant can be predicated, or from which it can be inferred.

This allegation is not sufficient to charge notice upon defendant. Under the rules of pleading, as laid down by the Supreme Court of Ohio, such an expression is held to indicate mere passivity, or non-action on the part of the defendant in regard to the matter which may result from want of knowledge.

Robinson vs. Greenville, 42 O. S., 625-630.

The allegation is not that defendant, with knowledge, or knowingly, suffered and permitted, etc., but "wrongfully" did so. Whether it was wrongful or not is a question of law, and depends upon whether knowledge existed or not.

The allegation that a thing is "wrongfully" or "unlawfully done," is a conclusion of law.

Mitchell et al. vs. Treasurer of Franklin Co., 25 O. S., 143 153.

Pelton vs. Bemis, 44 O. S., 51.

Pomeroy, Remedies and Remedial Rights, Sec. 530-531.

Constructive notice can hardly be claimed, as the averment of the petition limits the existence of the nuisance to the day and night of November 12th.

The Court therefore erred in overruling the objection of defendant below to the introduction of any testimony on behalf of plaintiff under the pleadings.

See printed record, page 15.

Third. The Court erred in admitting the testimony of Kostering, as to the length of time the material had been in the street.

Printed record, page 96.

The petition alleges the existence of an obstruction during a single day and night, hence proof was inadmissible to show that it had in fact been in the street for a longer period.

Fourth. The verdict was against the weight of evidence.

1st. Under the charge of the Court, which, if there was any liability at all on the part of the City, announced the correct doctrine of the law, it was incumbent on the plaintiff to prove that the obstruction in the street was unreasonably or unnecessarily there or was there without proper lights or other guards to warn passers-by of its existence and that such defect existed with the knowledge of the City either actual or constructive, for a sufficient length of time for the City to have remedied it if proper diligence had been exercised by it.

There was no proof whatever introduced or offered by plaintiff tending to show that the material as located was unnecessarily in the street or that it had been in the street for an unreasonable length of time.

There was nothing to show that it was unnecessary to occupy *all* the space that was occupied by the material or that the length of time the street was occupied, was, under the circumstances, unreasonable.

Plaintiff did offer in evidence the permits and testimony tending to prove that the space in fact occupied by the material exceeded that authorized by the permits.

But supposing this to be true, it did not follow as a matter of course, nor was that in itself evidence tending to

prove that the occupation of more space than one-third of the roadway and one-half the sidewalk was unreasonable or unnecessary. The builder would not be limited to the prescribed space if, as a matter of fact, it was reasonably necessary to occupy more, in order to perform the work necessary to construct the building upon which he was engaged.

Besides, if any inference is to be drawn from the action of the City in the matter, its failure to interfere and require the material to be confined within the prescribed limits, is equally strong proof that it regarded the occupation had as reasonable and necessary under the circumstances, especially if it be assumed that the City had knowledge of the extent of such occupation.

Again, as to the length of time the material was in the street, the permit covers a period of 120 days, which had not expired at the date of the accident. If inferences are to be drawn from the permits, then they show that, in the judgment of the City, the time that the material was actually in the street up to the date of the accident was not unreasonable.

These constitute the entirety of the proof offered by plaintiff as to the unreasonable and unnecessary occupation of the street by the materials.

We submit, then, that there is not in this case any evidence upon which to base the verdict rendered, because of the unreasonable and unnecessary occupation of the street.

But the defect upon which reliance is placed, both in the petition and proof, is the absence of a light or other sufficient signal to warn plaintiff of the existence of the obstruction in the street.

Municipal corporations are not insurers of the safety of their public ways, or the lives and limbs of pedestrians.

Chase vs. Cleveland, 44 O. S. 505–513.

2nd. Dillon, Mun. Corp., Sec. 1019.

"Municipal corporations are not responsible for every unauthorized act that may be done by any one, resulting in injury, either directly or indirectly, to persons traveling the streets."

Joliet vs. Seward, 86 Ill., 402, 404, 405.

"A municipal corporation is not liable for injuries caused to individuals by obstructions on the highway not placed there by its own officials, or by authority of the city government, until after actual notice of the existence, or until by reason of the lapse of time it should have had knowledge, and therefore, actual notice may be presumed."

Hume vs. Mayor, &c., 47 N. Y., 639.

"A city is not liable for the acts of a person it licenses to use its streets unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees."

City of Warsaw vs. Dunlap, 112 Ind. 576.

In the above case the authorities of the City of Warsaw had issued a builder's license similar in its character to the permits introduced in evidence in this case.

On page 582, the Court say: "As the use was neither dangerous nor unlawful, the municipality was not bound to keep constant watch over the builders. Its officers had a right within reasonable limits, to presume that men engaged in a lawful work would do it in a lawful manner. They were not

bound to anticipate negligence on the part of the men thus engaged."

The record in this case discloses no fault on the part of the City ; but on the contrary, that it had taken every reasonable precaution to provide against accident.

It had enacted an ordinance requiring such material, when placed in the street, to be protected by sufficient lights and affixed a penalty for a violation thereof.

It had granted a permit upon condition of ample protection.

Printed record p. 88–9.

Its street lamps were lighted, and a post was located only about 40 feet away at the corner of Bank and Johnson streets.

Kostering's testimony pp. 101, 102.
Schuepach " " 117.
Reiley " " 128.
Baker " " 139.
Hildebrand " " 160.

It had no actual knowledge either of the existence of the material in the street or of the absence of lights therefrom.

Although permits were issued July 16, and Sept. 19 to place such material in the street, as a matter of fact none was placed therein till the latter part of October.

See testimony of Rosenfeld & Kostering, pp. 95 and 96.

It had no constructive notice of the absence of the lights, for there was not sufficient time between dusk, say 5.30 P. M. and 7 P.M. when the accident occurred, to give constructive notice. When an obstruction, of which the City has no notice, has been placed on a street by a third person and is

permitted to remain *an hour* and *three-quarters* when it occasioned an injury to a passer-by, the City is not guilty of negligence, and is not liable."

Warsaw vs. Dunlap, supra.

We affirm therefore, that there is nothing in this case on which to predicate a liability, unless the City is held to be an absolute insurer of the safety of all travelers along its streets, a doctrine at variance with the holding of our own Supreme Court and with the current of decisions elsewhere as we have before shown.

"No municipality has eyes to see or hands to remedy all the negligence that happens in its streets. If a City is bound to know what lights are burning at every place where there are excavations and other things in streets requiring to be signalled by colored lanterns, and to place such lights when they are lacking, it is bound to do what is impossible; still less is this so when the City has no notice of its own.

"The object of by-laws on such subjects is to compel private persons to adopt the necessary precautions, and that is all that can reasonably be done.

"The corporation is to judge for itself what by-laws are likely to be sufficient. Its duty goes no further."

Campbell J. in Joslyn vs. Detroit. 25 Am. & Eng. Corp. Cases, 46.

Plaintiff in error therefore asks that the judgment of the Circuit Court may be reversed and that it may be restored to everything it has lost by reason thereof.

ALLAN T. BRINSMADE,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

THE CITY OF CLEVELAND,

Plaintiff in Error,

vs.

HENRY KING,

Defendant in Error.

Brief for Defendant in Error.

RICHARD BACON,
E. K. WILCOX,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE CITY OF CLEVELAND,
Plaintiff in Error,

vs.

HENRY KING,
Defendant in Error.

Brief of Defendant in Error.

The original action was brought in the Circuit Court of the United States for the Northern District of Ohio, by the said Henry King, against the City of Cleveland, to recover damages for an injury by him received in being thrown from a buggy whilst driving along Bank street, one of the public streets of said city.

STATEMENT OF FACTS.

It appears from the testimony that on July 16th, 1879, the defendant corporation—The City of Cleveland—duly issued and granted to one E. Rosenfeld, a "permit," authorizing said Rosenfeld to occupy a portion of said Bank street, and to obstruct and encumber the roadway of said street by placing thereon building materials, which said permit is fully set out out on page 88 of the printed record, and page 124 of the original record.

That on or about September 19th, 1879, said defendant corporation issued and granted its "permit," authorizing one

Frank Kostering to occupy a portion of said Bank street, and to obstruct and encumber the same by placing thereon building materials, which said permit is fully set out on page 88 of the printed record, and page 125 of the original record, the latter "permit" being a continuation of the permission granted by the former: That building material was placed in said Bank street and had remained there under said authority from defendant for a long time, to-wit, more than two months prior to November 12th, 1879, and that on said November 12th, 1879, said street, which was 59 feet in width, was obstructed by said material to the extent of more than one-half the width thereof, to-wit, 33 feet from the east curbstone, which on said night was permitted to so remain in said street without any signal or light to guard the same or to denote that it was there.

That during the night time of said 12th day of November, 1879, plaintiff King, who was a citizen of the State of Pennsylvania, being in said city of Cleveland, started, about 7 o'clock in the evening, in company with one Elwood, a liveryman, to go in a buggy from the Kennard house, a hotel at the corner of Bank and St. Clair streets, northerly on Bank street to the Union Depot. That while driving along said street the buggy collided with said building material, was overturned, and said King thrown out and severely injured.

Section 2640 Revised Statutes of Ohio is as follows:

"The council shall have the care, supervision and control of all public highways, streets, avenues, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open, in repair and free from nuisance."

Other statutes empower a municipal corporation to provide the ways and means for the complete carrying out of the letter and spirit of this section. The levying of taxes for the care and improvement of streets, the power to abate nuisances, the creation of Boards of Improvements, and the providing of Street Commissioners are all rendered necessary by the power conferred and the duty imposed upon the municipality under the section referred to.

"It is a principle of nearly universal acceptation in this country, when a town is incorporated and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, that the corporation not only assumes this duty, but by implication agrees to perform it for the benefit and protection of all who may have occasion to make use of these public easements; and that for any failure in the discharge of this duty the corporation is responsible to the party injured."

Cooley on Torts, 625.

"DEFECTIVE HIGHWAYS A NUISANCE.—For the communities, individuals or corporations, upon whom is imposed the burden of keeping a highway in repair, to permit the same to be out of repair so as to endanger the safety of persons or property passing over it, or so as seriously to interfere with convenient transit over the same, is a public nuisance at common law, subjecting the communities, persons or corporations, upon whom the duty of keeping it in repair is imposed, to indictment, and generally to damages at the suit of persons injured by reason of such defects or want of repair."

Wood on Nuisances, Sec. 302.

Referring to the above, the Court, in 46 O. S. says:

"We conclude that the generally accepted rule is, that although the nuisance be a public one, yet it is private also, if an individual sustain a special injury thereby, and he may maintain an action and recover his special damage, whether it be direct or only consequential."

"The maintenance of any nuisance implies negligence, or worse."

"Any failure to keep a safe highway implies neglect."

Cardington vs. Fredricks, 46 O. S. 000.

"The statute (see 2640 Rev. Stats. Ohio,) gives to municipal corporations the care, supervision and control of all public highways, etc., and requires that the same shall be kept open and in repair and free from nuisance. In effect it is a requirement that the corporation shall prevent all nuisances therein, and by allowing a street to become so out of repair as to be dangerous, the corporation itself maintains a nuisance, and a suit to recover for injuries thereby occasioned is for damage arising from a nuisance."

"The statute does not give a remedy, but it enjoins the duty. And when a duty to keep streets in repair is enjoined on municipal corporations, either by a statute in the form now in force, or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and gives power to levy taxes for that purpose, and presumably to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect arises by the common law." *Ibid.*

The duty imposed by the charter of a municipal corporation to keep its streets and highways "in repair" is a perfect corporate duty, for the breach of which the municipal corporation must answer in damages. This duty is performed where there is no defect, imperfection, or obstruction in the street which renders it unsafe or inconvenient for use by the public.

Campbell vs. Montgomery, 53 Ala., 527.
Barnes vs. District of Columbia, 91 U. S., 547.

In Weet vs. Brockport, 16 N. Y. 161. which is recognized as a leading case, Judge Selden, in the opinion, asserts the liability to an action upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter.

We claim for the defendant in error that by virtue of said statutes and in consideration of the benefits conferred by the charter, it is an imperative duty cast upon municipal corporations in Ohio to guard and maintain their public streets, that the same may be kept in repair, open for public use, and free from nuisance; and that for a failure to perform this duty, the municipal corporation is liable.

This liability is recognized by the Supreme Court of Ohio in every instance where the same has been considered.

Vandyke vs. The City of Cincinnati, 1 Disney, 532.
Western Col. vs. Cleveland, 12 O. S., 325.
Robinson vs. Greenville, 42 O. S. 625.
Cardington vs. Fredricks, 46 O. S., 000.
See also Barnes vs. District of Columbia, 91 U. S., 555.

It is a well recognized principle, that for taking or neglecting to take strictly governmental action municipal corporations are under no responsibility except the political responsibility to their corporators and to the state; for the reason that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals for acts done or omitted in the administration of governmental functions.

Such powers are conferred for public purposes and are to be excercised for the public good within the discretion of the municipal corporation.

"There is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation and its adaptation for the purposes of residence or business. As to the first the municipal corporation represents the state, discharging duties incumbant on the state, as to the second the municipal corporation represents the pecuniary and proprietary interests of individuals."

Western Col., etc., vs. Cleveland, 12 O. S., 375.
Robinson vs. Greenville, 42 O. S., 625.

The word "nuisance" as used in Sec. 2640, Revised Statutes of Ohio, has been construed by the Supreme Court as follows:

"In our opinion the word nuisance in this connection does not include an assemblage of persons engaged in such unlawful act, but refers to something which is in a sense fixed or permanent, as a defect in the street."

Robinson vs. Greenville, 42 O. S., 630.
Cardington vs. Fredricks, 46 O. S., 000.

In construing a statute similar to the one in Ohio, (Sec. 2640,) wherein a duty was imposed upon a municipal corporation to keep its streets and highways "in repair," the court said:

"It has no reference to unlawful assemblages, violence, riots and the like whereby passage along the streets is temporarily rendered inconvenient or dangerous, for none of these occurrances put the *highway* out of 'repair.'"

Campbell vs. Montgomery, 53 Ala., 527.

We submit that where such nuisances as are contemplated by the statute exist, to-wit: The street being out of repair, whether by reason of excavations made therein or obstructions placed thereon, which can be properly guarded, remedied, or removed in the ordinary way, the duty devolving upon a municipal corporation to properly guard said obstructions, remove the same or put said street in repair, are purely ministerial duties, and a failure to perform the same renders the corporation liable to individuals injured thereby.

"Where a duty of a ministerial character is imposed by law upon a public officer or corporation, a negligent omission to perform that duty creates a liability on the part of such corporation for the damages which individuals may sustain by reason of such omission, and may be enforced by civil action by the party injured."

McCarthy vs. The City of Syracuse, 46 New York, 194.

NOTICE—Regarding the question of notice the plaintiff in error has, we think, misconstrued the language of the petition —the averment therein being as follows :—

"And yet the said defendant, well knowing the premises heretofore on the 12th day of November, A. D. 1879, wrongfully placed and permitted to be placed, etc., * * * * * * * * * * * and negligently and wrongfulley suffered and permitted, etc.," which we submit is not only a common and usual form of averment, but is entirely sufficient to charge knowledge upon the defendant, which necessarily implies notice.

"When the duty is imposed by law upon a municipal corporatio of keeping a structure *in repair*, it involves the exercise of a reasonable degree of watchfulness in ascertaining the condition, etc., from time to time, and when this is omitted the corporation is liable for damages resulting from defects which would have been disclosed by an examination."

McCarthy vs. The City of Syracuse, 46 New York, 194.

In the case at bar the defendant corporation by its permits authorized the placing of the obstructions complained of in said street, and cannot we think, under such circumstances be heard to disclaim knowledge of its existence. In such cases we maintain that no *notice* of the defect is necessary to fix the liability.

"It became (and was) the duty of the city to know of the defect, if any existed, and their not knowing it *is itself negligence;* and such negligence cannot possibly have the effect of excusing them for not repairing or *properly guarding* the defect in question.

"The rule that the city must have notice, actual or implied, of a defect in a public way, before it can be held liable for an injury caused by the defect, has no application to a case where the ignorance of the defect is the result of a clear and unmistakable omission."

"Ignorance in such a case is itself negligence."

Boucher vs. The City of New Haven, 40 Conn. 456.

"Notice to a town of a defect in a highway may be *inferred* from the notoriety of the defect and its continuance for such a length of time as to lead to the presumption that the proper officers of the town knew, or with proper vigilance and care might have known of it."

Reed vs. Northfield, 13 Pickering, 94–98.
Manchester vs. The City of Hartford, 30 Conn. 118.

Questions of notice and negligence are peculiarly within the province of the jury, and when determined by them under all the circumstances of the case, their finding will not, we think, be reviewed by this court.

We cite: Storrs vs. Utica, 17 N. Y. 104.
Buffalo vs. Holloway, 8 Selden 498.
Baltimore vs. O'Donnell, 53 Md. 110.
The City of Detroit vs. Corey, 9 Mich. 165.
Child vs. Boston, 4 Allen 41.

RICHARD BACON,
E. K. WILCOX,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 89.

THE CITY OF CLEVELAND, PLAINTIFF IN ERROR,

vs.

HENRY KING.

(Supreme Court of Ohio.)

THE VILLAGE OF CARDINGTON
vs.
THE ADM'R OF MARY J. H. FREDERICKS.

An action against an incorporated village founded upon a petition alleging in substance that a street much used by the citizens and the public was so unskillfully and negligently constructed and left by the defendant as to be in an unsafe and dangerous condition and allowed to become out of repair and obstructed by the rubbish and refuse of the village, so that it was highly dangerous, and that the plaintiff, while lawfully passing along the street, accidentally and without fault or negligence on her part, was precipitated down an embankment, whereby she was greatly bruised and injured, for which damages she asks judgment, is an action

"for a nuisance" within the meaning of section 5144, Revised Statutes, and abates at the death of the party injured.
(Decided May 21, 1889.)

Error to the Circuit Court of Morrow County.

Powell, Owen, Ricketts & Black, with R. F. Bartlett and J. K. Dunn, for plaintiff in error; Andrews & Sims, for defendant in error.

Mary J. H. Fredericks commenced an action against the Incorporated Village of Cardington in the court of common pleas of Morrow county. After answer filed, the plaintiff deceased, and, by leave of court, her administrator became party plaintiff, and filed petition. The sole issue in the case is as to whether an action can be maintained on that petition, which is as follows:

"MARY J. H. FREDERICKS, *Plaintiff*,
against
"THE INCORPORATED VILLAGE OF CARDINGTON, OHIO, *Defendant*.

"*Petition of James M. Sherman, Administrator.*

"And now comes the said James M. Sherman and represents—

"*First.* That on or about the 18th day of July, A. D. 1884, the said Mary J. H. Fredericks died intestate.

"*Second.* That on the 4th day of August, A. D. 1884, he, the said James M. Sherman, was by the probate court within and for the county of Morrow, Ohio, duly and legally appointed administrator of the estate of Mary J. H. Fredericks, deceased; that he gave his bond as required by law as such administrator, and entered upon the discharge of said trust, and that he is now the duly and legally appointed and acting administrator of said estate.

"*Third.* That at the October term of this court, 1884, the death of the said Mary J. H. Fredericks was duly suggested; and, by order of the court, the administrator was made a party to said action, and leave given said administrator to file petition.

"*Fourth.* That pursuant to said order of court and leave to plead, the said administrator says that the said defendant is a municipal corporation duly organized under the laws of the State of Ohio.

"*Fifth.* That on or about the 28th day of April, A. D. 1883, a certain public street in said village, known as 'Main street,' which was much traveled and used by the citizens of said village and the public generally, was so unskillfully and negligently constructed and left by the defendant as to be in an unsafe and dangerous condition, which street, thus unskillfully and negligently constructed, was by said defendant allowed to become out of repair and obstructed by the rubbish and refuse of the village, so that the same became and was at the date last aforesaid highly dangerous; all of which the said defendant then and there had due and legal notice.

"*Sixth.* That on the said 28th day of April, A. D. 1883, the said Mary J. H. Fredericks was lawfully traveling on said street, and while lawfully passing along said street, accidentally and without fault or negligence on her part, was precipitated down an embankment a distance of about twenty feet, whereby she was greatly bruised and injured.

"*Seventh.* That the injury herein complained of was wholly in consequence of the dangerous condition of said street, as herein set forth.

"*Eighth.* That by reason of the premises she was damaged in the sum of five thousand dollars.

"*Ninth.* That on the 10th day of November, A. D. 1883, she filed with the clerk of said defendant her claim for damages, as herein set forth, which said claim remained unadjusted for a period of sixty days and more prior to the commencement of this action.

"And yet the said defendant has not paid said sum of money nor any part thereof, though often requested so to do.

"The said James M. Sherman, as administrator as aforesaid, therefore prays judgment against the said defendant for the sum of five thousand dollars, with interest and cost of suit."

The court of common pleas sustained a demurrer to the petition and dismissed the action. This judgment was reversed by the circuit court. To obtain a reversal of that judgment this proceeding in error is prosecuted.

SPEAR, *J.*:

The grounds urged for reversal of the judgment of the circuit court are—

1. The action was for a nuisance, and hence abated at the death of the party injured.

2. The petition did not state facts sufficient to constitute a cause of action.

Was the action below one for a nuisance? The *gravamen* of the petition is that the deceased was injured because of the dangerous and unsafe condition of the street along which she was traveling; that the street had been unskillfully and negligently constructed and left, was out of repair, and obstructed by rubbish and refuse; in other words, the charge is that the village constructed a dangerous road and allowed it to become and remain out of repair, from which private damage ensued.

The term "nuisance" is of extended application. Many definitions are given, necessarily varied because the word applies to a large number of subjects. "The term 'nuisance,' derived from the French word '*nuire*,' to do hurt or to annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights." (Addison on Torts, 155.) "Nuisance, something noxious or offensive. Anything not authorized by law which maketh hurt, inconvenience, or damage. It may be (*a*) *private*, as where one so uses his property as to damage another's or disturb his quiet enjoyment of it; (*b*) *public* or *common*, where the whole community is annoyed or inconvenienced by the offensive acts, as where one obstructs a highway or carries on a trade that fills the air with noxious and offensive fumes." (Cochran's Law Lexicon, 192.)

We presume it can hardly be doubted that the street, as described in the petition in this case, was in law a nuisance. "Nuisances to highways, bridges, and public rivers: These annoyances may be either *positive* by actual obstruction or *negative* by want of reparation. In the latter case only those persons are liable whose duty it is to keep the road, etc., in repair." (Harris' Criminal Law, 118.) "Defective highways a nuisance: For the communities, individuals, or corporations, upon whom is imposed the burden of keeping a highway in repair, to permit the same to be out of repair so as to endanger the safety of persons or property passing over it, or so as seriously to interfere with convenient transit over the same, is a public nuisance at common law, subjecting the communities, persons, or corporations upon whom the duty of keeping it in repair is imposed to indictment, and generally to damages at the suit of persons injured by reason of such defects or want of repair." (Wood on Nuisances, section 307.)

We conclude that the generally accepted rule is, that although the nuisance be a public one, yet it is private also, if an individual sustain a special injury thereby, and he

may maintain an action and recover his special damage, whether it be direct or only consequential.

This petition then charged the maintenance of a nuisance. It charged that by reason of that nuisance the plaintiff's intestate had been injured. It is insisted that the action below was for negligence. This proposition does not seem to advance the argument. The maintenance of any nuisance implies negligence, or worse. The negligence averred produced a nuisance, and it was the nuisance which was the occasion of the injury. Any failure to keep a safe highway implies neglect, but it was necessary to allege a state of facts from which the negligence would be inferred. Averring such state of facts showed that a nuisance had been created, but it was not necessary that the word "neglect" or "negligence" should be used in the petition. The action was, therefore, "for a nuisance"—*i. e.*, for maintaining a nuisance from which private damage ensued.

The statute (sec. 2640, Rev. Stats.) gives to municipal corporations the care, supervision, and control of all public highways, etc., and requires that the same shall be kept open, and in repair, and free from nuisance. In effect it is a requirement that the corporation shall prevent all nuisances therein, and when by allowing a street to become so out of repair as to be dangerous the corporation itself maintains a nuisance, and a suit to recover for injuries thereby occasioned is for damage arising from a nuisance or "for a nuisance." The statute does not give a remedy; it but enjoins the duty. And when a duty to keep streets in repair is enjoined on municipal corporations, either by a statute in the form now in force or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and gives power to levy taxes for that purpose, and presumably to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect arises by the common law.

Did the action abate by the death of the person injured?

As a general rule, at common law, actions *ex contractu* survived, while actions *ex delicto* did not. To this there were exceptions. One was that, in actions *ex delicto*, so far as the act complained of resulted in damage to property, the action survived. Another was, that though the action was founded on contract, as a suit for breach of promise of marriage, yet, if the damage resulting was to the person, and not to the property, the action did not survive. The reason for the distinction was stated by Lord Ellenborough, in *Chamberlain* v. *Williamson*, 2 M. & S., 408, thus: "Executors and administrators are representatives of the temporal *property*—that is, *the debts and goods of the deceased*—but not of their wrongs, except when those wrongs operate to the temporal injury of the personal estate." In other words, the pain and suffering endured, or the impairment of the body, not being a property interest, did not pass to a personal representative. Nor were such causes assignable. The rule was that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable." (*McKee* v. *Judd*, 12 N. Y., 622.) "A chose in action which is transmissible to an executor or administrator, under our law, is assignable in equity; but personal torts, which die with the person, are not assignable." (*Grant* v. *Ludlaw*, 8 Ohio St., 37.) Survivability and assignability of things in action were thus treated as convertible terms. "In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment." (*Tomegys* v. *Vane*, 1 Pet., 213.)

In this view at common law no action for death occasioned by wrongful act could be maintained. No right was transmitted, because no person has such an interest in his own life as will constitute property in any legal sense, and property rights only were transmissible. Hence followed the enactment of statutes in many of the States, including our own, giving a right of action for death occasioned by